## STATEMENT OF QUESTION PRESENTED FOR REVIEW

Should a Board bargaining order be denied enforcement where the petitioned-for bargaining unit has been almost totally eroded during a five-year delay between the Administrative Law Judge hearing and the Board's order, and where there has been significant managerial turnover?

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No.____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1988

KEYSTONE LAMP MANUFACTURING COMPANY,
*Petitioner*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Keystone Lamp Manufacturing Company, respectfully prays that a Writ of Certiorari issue in the above-captioned matter to review the judgment and opinion of the United States Court of Appeals for the Third Circuit enforcing an order of the National Labor Relations Board against Petitioner.

### PARTIES TO THE PROCEEDING

Petitioner is Keystone Lamp Manufacturing Company ("Keystone").[1] Respondent is the National Labor Relations Board ("Board").

1. Pursuant to Rule 28.1 of the Rules of Supreme Court, Petitioner herein discloses that it is a subsidiary of Hanson Industries, PLC, London England.

## CITATIONS OF OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at ____F.2d ____ , 128 LRRM 2664 (3d Cir. 1988), and is included in the Petitioner's Appendix, commencing at page A-6. The Order of the Court of Appeals denying rehearing in banc on July 6, 1988 is included the Appendix beginning at page A-4. The Decision and Order of the National Labor Relations Board is reported at 284 NLRB No. 74, 125 LRRM 1296 (1987), and appears in the Appendix, beginning at page A-12.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1988. Petitioner's request for rehearing in banc was denied by order of the Court of Appeals on July 6, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) (1976).

## STATUTORY PROVISIONS

National Labor Relations Act:

Section 7, 29 U.S.C. §157 (1976):

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)

Section 8(a)(1), 29 U.S.C. §158(a)(1) (1976):

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;

Section 8(a)(3), 29 U.S.C. §158(a)(3) (1976) [in pertinent part]:

> (a) It shall be an unfair labor practice for an employer –
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

Section 8(a)(5), 29 U.S.C. §158(a)(5) (1976):

> (a) It shall be an unfair labor practice for an employer –
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

## STATEMENT OF THE CASE

### Factual Background

Keystone is a portable lamp company, located in Slatington, Pennsylvania, where it manufactures and markets lamp products. In 1981, when the present controversy arose, the Slatington facility employed 421 workers, of which 38 were non-bargaining unit clerical and technical employees. The production and maintenance employees at the facility have been continually represented by the United Steelworkers of America, AFL-CIO, CLC ("Union") since 1962. (A-32). Currently, there are a total of 279 workers at the Slatington

facility, of which 62 are non-bargaining unit clerical and technical employees.

This petition challenges the Third Circuit's enforcement of a bargaining order issued by the Board approximately seven years after a Board-supervised representation election among Keystone's clerical employees[2] on July 20, 1981, which Keystone won by a vote of 12 to 7. The bargaining order, which was delayed for five years following the close of the Administrative Law Judge ("ALJ") hearing, was predicated on the Union's pre-election authorization card majority and alleged "Category II" employer misconduct under the standards announced in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) ("*Gissel*")[3]

This five-year delay was solely the result of Board inaction. The intervening years witnessed a dramatic

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2. The election was conducted in the following unit of employees: All office clerical employees including keypunch operators, order entry clerk, computer operator, payroll clerk, and time recordkeepers, and excluding production and maintenance employees, shipping clerks, production control employees, time study technicians, managers, guards, and supervisors as defined in the Act.

3. In *Gissel*, this Court first enforced an order by the Board directing an employer to bargain with a union without a further election because of the employer's unfair labor practices. More specifically, this Court held that a bargaining order is appropriate not only in "exceptional" cases marked by "outrageous" unfair labor practices, but also in "less extraordinary cases marked by less pervasive practices which nevertheless still have the tendency to undermine majority strength and impede the election processes" where "there is also a showing that at one point the union had a majority." 395 U.S. at 614.

In cases falling within this second category, a bargaining order is appropriate "[i]f the Board finds that the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be protected by a bargaining order." *Id.* at 614-615. The case at bar is one of those "less extraordinary cases marked by less pervasive practices", and is commonly referred to as a "*Gissel II*" case. (A-21).

turnover of the clerical employees, as well as significant turnover in management, with previous actors who were allegedly responsible for Section 8(a)(1) violations no longer on the scene. In addition, all alleged Section 8(a)(3) discriminatees were reinstated prior to the issuance of the Board's order but later left Keystone's employ. Since the 1981 election, current management has remained free of any further complaints of unfair labor practices and has continued to maintain amicable relations with the same Union vis-a-vis Keystone's production and maintenance employees, a relationship that began more than twenty-five years ago.

More critically, as a result of normal attrition, transiency and Company growth, there has been a 73% turnover of workers in the bargaining unit since the time of the ALJ hearing. Of the twenty-two employees who voted in the 1981 election, only six remain in Keystone's employ, and two are in job classifications that are specifically excluded from the petitioned-for unit. Of the thirteen employees who signed allegedly valid authorization cards in April of 1981, only two remain with Keystone, one of them in a job classification that is also specifically excluded from the bargaining unit. As of the date of the filing of this petition, Keystone no longer employs keypunch operators, payroll clerks, or time recordkeepers, all of which were job classifications in the petitioned-for bargaining unit. At most, there currently would be 10 employees in the unit, *less than half* of the original unit, if the Third Circuit's enforcement of the Board's order is allowed to stand.

Notwithstanding the obvious relevance and importance of this post-ALJ hearing history, the Board refused to consider its effect on the enforcement of its order. Keystone's attempt to introduce evidence of employee turnover was denied by the Board — without explanation — as "lacking in merit." (A-11). Keystone's two attempts to bring the Board's refusal to the attention of the Court of Appeals were also rebuffed, and, in effect,

ignored, as the court relied on the Board's right to "adopt the analysis of the administrative law judge in support of the need for a bargaining order." (A-9).

**The Proceedings Below**

Following the July, 1981 election which Keystone won, the Union filed objections and unfair labor practice charges alleging, *inter alia,* that Keystone violated Sections 8(a)(1), (3), (4) and (5) of the National Labor Relations Act ("Act"), 29 U.S.C. Sections 158(a) (1), (3), (4) and (5). (A-31). A consolidated complaint was issued by the Board on August 31, 1981. (A-30).

On December 30, 1982, six months following a formal hearing, the ALJ issued a Decision and Recommended Order, finding that Keystone violated Sections 8(a)(1), (3) and (5) of the Act by unlawfully interrogating employees about their Union activities, laying off employees because of their Union activities, and refusing to bargain with the Union. (A-30-103). Recommending that Keystone cease and desist reinstatement and backpay to three alleged discriminatees; and (2) upon request, bargain with the Union as the exclusive representative of employees in the unit described above. (A-97-100).

Four and one-half years later (five years after the hearing) on June 30, 1987, a three-member panel of the Board issued a Decision and Order dismissing five Section 8(a)(1) allegations relating to interrogation of employees to which the ALJ had found merit. (A-13). The Board upheld only two of the ALJ's findings that Keystone violated Section 8(a)(1) of the Act and concluded that it was not necessary to pass on the remaining alleged Section 8(a)(1) violations, as further findings would merely be cumulative and not affect the recommended remedy. (A-13, 13 n. 2, 14-15). The Board also

upheld the ALJ's findings that the layoffs of the three employees violated Sections 8(a)(1) and (3) of the Act. (A-17).

The Board adopted the recommended order of the ALJ that Keystone recognize the bargain with the Union as of April 6, 1981, the date of the Union's initial demand for recognition. (A-22-23).

On August 28, 1987, Keystone filed a Motion for Reopening of the Record and Motion for Reconsideration of the Board's Order. (A-10). In support of its Motion, Keystone argued that extraordinary circumstances and previously unavailable evidence, to wit, the seven-year passage of time since the election and five-year delay in issuing the Board's order, together with bargaining unit and management turnover, ought to be considered by the Board in order to determine whether the policies and purposes of the Act would be effectuated by enforcement of the bargaining order. (A-10-11). Keystone further contended that a free election was possible and should constitute the Board's remedy in this case.

On September 30, 1987, the Board denied Keystone's Motion and directed Keystone to recognize and bargain with the Union. (A-11)

On October 19, 1987, Keystone filed an Amended Petition for Review requesting the Court of Appeals, at a minimum, to remand the proceedings so that the evidence of Keystone's changed circumstances could be considered by the Board. (A-8). On May 9, 1988, the court denied Keystone's petition, and enforced the Board's order in full, noting that while "[t]he order respecting reinstatement or other relief for discharged employees has become moot by virtue of subsequent events . . . [g]iven . . . the presence in the unit of employees who were there at the time, and the presence of the same managers, the Board reasonably concluded that the ordinary cease and desist, reinstatement and make whole remedies would not erase the effects of

[Keystone's] unfair labor practices in eroding the Union's former majority status." (A-9).

On July 6, 1988, the Court of Appeals denied Keystone's Petition for Rehearing In Banc. (A-5).

## REASONS FOR GRANTING THE WRIT

**The Decision Below Conflicts with the Decisions of the District of Columbia, Second, Fourth, Fifth, Sixth and Seventh Circuit Courts of Appeals with Respect to The Effects of Subsequent Events on the Contemporary Enforcement of a *Gissel II* Bargaining Order.**

The Third Circuit's enforcement of the Board's order creates a direct conflict with other courts of appeals which have held that subsequent events, such as the passage of time and bargaining unit turnover (which in this case are *greater* than in most reported cases), lessen the deleterious effects of an employer's unfair labor practices thereby making a fair election possible. A once appropriate bargaining order thus becomes obsolete, moot and incapable of contemporary enforcement.

The fundamental policy of the Act is to ensure employee self-determination on union matters:

> Employees shall have the right to self-organization, . . . through representatives of their own choosing, and . . . shall have the right to refrain from any or all of such activities.

29 U.S.C. §157.

In light of this policy, this Court proclaimed in *Gissel* that any bargaining order is a drastic remedy, not to be favored, except in the most compelling circumstances, over the preferred remedy of allowing free employee choice in a secret ballot rerun election. According to the Court, in cases where the violations are not claimed to be "outrageous", but rather where a lesser "Category II" showing of employer misconduct is alleged, the Board may only issue a bargaining order upon a finding that

the effects of past unfair labor practices and the probability of future misconduct necessitate extraordinary relief.

Using this analysis, the circuits have universally insisted that the Board include in any *Gissel* order a specific and *meaningful* examination as to why the atmosphere remains sufficiently poisoned as a result of employer practices that a fair rerun election cannot be held. Contrary to the decision of the Third Circuit in this case, the courts have held that the analysis must occur as of the time the Board seeks enforcement of its bargaining order – not as of some earlier date when infractions are alleged to have occurred. *See, e.g., NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 231 (2d Cir. 1983) ("The Board must show that the bargaining order is appropriate when it is issued, not at some earlier date"). *Accord NLRB v. Apple Tree Chevrolet,* 671 F.2d 838, 841 (4th Cir. 1982); *Red Oaks Nursing Home, Inc. v. NLRB,* 633 F.2d 503, 509 (7th Cir. 1980); *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 449 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970).

Further, in measuring the present appropriateness of bargaining order enforcement, particularly in determining whether prior coercive effects have dissipated, other circuit courts have long viewed subsequent events, such as employee and management turnover, as factors which may superannuate bargaining orders to the point that the orders are entirely incapable of enforcement. *See, e.g., NLRB v. Marion Rohr Corp.*, 714 F.2d at 231 (". . . the Board may not . . . simply disregard factors that militate against enforced bargaining. For example, events subsequent to the employer's violations such as the passage of time and the substantial turnover of employees, are relevant and important factors which should be considered"). *Accord NLRB v. Creative Design,* ____F.2d ____ , 128 LRRM 3089, 3095 (D.C. Cir. 1988); *Apple Tree Chevrolet,* 671 F.2d at 842; *Red Oaks*

*Nursing Home,* 633 F.2d at 509; *NLRB v. Ship-Shape Maintenance,* 474 F.2d 434, 443 (D.C. Cir. 1972).

Indeed, in cases where the time span between the violation and enforcement of a bargaining order is extended and turnover is substantial, courts have flatly refused enforcement even where the employer had engaged in pervasive unfair practices. *See, e.g., NLRB v. Pace Oldsmobile, Inc.,* 739 F.2d 108, 112 (2d Cir. 1984) (50% turnover and 3-year delay); *NLRB v. Knogo Corp.,* 727 F.2d 55, 60 (2d Cir. 1984) (60% turnover and 3-year delay); *NLRB v. Apple Tree Chevrolet, Inc.,* 671 F.2d at 842 (75% turnover); *NLRB v. Frederick's Foodland,* 655 F.2d 88, 90 (6th Cir. 1981) (*Gissel* order not justified based upon large increase in number of employees in the unit and the passage of time since the first election); *NLRB v. East Side Shopper, Inc.,* 498 F.2d 1334, 1336 (6th Cir. 1974) (more than 50% turnover).

Recently, the Seventh Circuit, in *Impact Industries v. NLRB,* 847 F.2d 379 (7th Cir. 1988), had before it facts that are indistinguishable from those here. Yet, it reached a result opposite to that reached by the Third Circuit. The Seventh Circuit declined to enforce a *Gissel II* bargaining order because of substantial changes in Impact's management and workforce which had occurred in the seven and one-half years between Impact's unfair labor practices and the issuance of the Board's order. Puzzled by the Board's refusal to consider that ". . . virtually all the employees present at the time Impact engaged in the illegal activities were gone, . . . [and] virtually any taint caused by its past activities would have been substantially dispelled by such a turnover," the court ruled that "more traditional remedies might be an effective means of rectifying Impact's past sins". 847 F.2d at 383. To the court, ". . . it did not appear that the outcome of a second election was preordained and that a bargaining order was necessary." *Id.*

The circumstances which motivated the Seventh Circuit to deny enforcement of the Board's *Gissel II* order are virtually identical to those presented here. In both cases, the Board refused to consider the employer's evidence of substantial changes in conditions at its facility, summarily denying motions for reopening the record and reconsideration. *Id.* at 381. For example, Impact experienced an 87% turnover in its workforce since the time of its first election in 1981. *Id.* at 383. Keystone, to date, has experienced a 73% turnover in its workforce since the 1981 election and the petitioned-for bargaining unit has shrunk by 55%.

The underpinnings of the Seventh Circuit's conclusion in *Impact* are drawn entirely from the prior decisions of other circuits holding that employee free choice requires an election if changed circumstances allow one, even though a bargaining order might once have been appropriate. The Second Circuit, in *NLRB v. Jamaica Towing, Inc.,* 632 F.2d 208 (2d Cir. 1980) stated:

> . . . there are cases where later relevant events are not of the employer's making and may, if ignored, result in *unnecessarily thwarting the genuine desires of the current work force.* If a new election would reliably reflect genuine, uncoerced employee sentiment, it does not reward the employer to hold one. Instead it 'effectuates employee rights,' as *Gissel* requires. An employer is 'rewarded' by a new election only when the original authorization cards are a more reliable indicator of employee desires than a new election. In resolving this issue it is illogical not to consider all relevant factors, including employee turnover and lapse of time. . . .

*Id.* at 214. (Emphasis added).

The Second Circuit maintained its stance regarding the relevance of subsequent events to *Gissel* orders in *NLRB v. Knogo Corp.,* where 60% bargaining unit

turnover during the three years that had elapsed between the election and the Board's issuance of the bargaining order cast "doubt on whether the employee preference for the Union expressed prior to the 1979 election through authorization cards still reflected majority will . . .". 727 F.2d at 60. The court was reluctant "to foist the Union upon all employees without a reasoned finding that a free election now, more than four years after the violations, is improbable", and concluded that "[t]he effect of our enforcing a bargaining order now could be to shift the burden to the employees to go through decertification proceedings." *Id.* at 60-61. Such an effect has clearly never been contemplated by the Court in *Gissel* or by the legislative focus of the Act. Interestingly, as here, the Board had denied Knogo's motion to reopen the record showing that there had been considerable turnover in the bargaining unit. *Id.* at 60.

For many years, the Fifth Circuit has required the Board to incorporate subsequent events into a *Gissel* analysis. In *NLRB v. American Cable Systems,* 427 F.2d 446, the court cited the need "to look at the contemporary necessity" for a bargaining order, and sharply criticized the Board for responding to its initial remand with "a litany, reciting conclusions by rote without factual explication". *Id.* at 449. The court emphasized the importance of employee free choice and concluded that the Board had seriously erred by:

> . . . satisfying itself with a jejune regurgitation of the Company's 1965 waywardness. We deem such findings insufficient under the teachings of *Gissel* to justify a 1970 bargaining order. *Gissel* does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. It requires contemporaneity — a present view, albeit with a historical perspective. *Industrial democracy should be allowed to work its will if the present conditions are sufficiently antiseptic for an election.*

*Id.* (Emphasis added).

Other circuit courts have been equally receptive to the impact of subsequent events in *Gissel* cases. *See, e.g., NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d at 841-842 (enforcement of *Gissel* order denied five years after election in light of Board's refusal, after remand, to consider 75% turnover in bargaining unit, and failure "to gather additional testimonial or documentary evidence to substantiate what were and continue to be only conclusory statements clothed with little more than transparent factual generalities."); and *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 153 (2d Cir. 1981) ("Rather than react in knee jerk fashion to the presence of a hallmark violation, the Board must still analyze the nature of the misconduct and the surrounding and succeeding events in each case in an effort to assess the potential for a free and uncoerced election under current conditions.").

The decision of the Third Circuit in this matter conflicts with other courts' application of the fundamental policy regarding employee free choice in that its enforcement of the Board's order vis-a-vis an almost entirely new bargaining unit under largely new and different management runs a substantial risk of opposing the majority's will and is therefore tantamount to the classic "non-majority" order condemned by the District of Columbia Circuit in *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983).

In so doing, the Third Circuit has not only split from the other circuits, it has reversed its previous course on this issue,[4] despite its mechanical recitation that:

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4. Implicit in the court's decision is a rejection of the Third Circuit's holdings in earlier *Gissel* cases, which heretofore required meaningful consideration of all relevant data *prior to* enforcement of a bargaining order. *See, e.g., NLRB v. Armcor Industries,* ____ F.2d ____, 98 LRRM 2441, 2444 (3d Cir. 1978) ("The Board should have taken additional steps as directed by our mandate to ascertain whether conditions at the plant at the time of remand

> While passage of time and turnover may be relevant to the Board's choice of remedy, the Board may nevertheless conclude that past union activity, employer response to such activity, *the continuing presence in the bargaining unit of employees subjected to that response,* and the continuing presence of the same employer management make a bargaining order appropriate.

(A-8-9) (Emphasis added). Making the Third Circuit's action in this case and its departure from the other circuits particularly egregious is that fact that the delay and turnover here are greater than those in the cases discussed above. Moreover, there is no evidence in the record upon which to base the court's determination that the bargaining unit was composed of the same employees who voted in the 1981 election. Certainly, the Board has never made such a finding.

The Board similarly accorded little importance to the events subsequent to the close of the ALJ hearing, casually referencing in its decision that, "[a]lthough there has been a significant passage of time since the violations occurred, this does not warrant withholding a bargaining order in light of the seriousness of the violations and their impact on the entire unit." (A-22). The Board simply refused to consider that the unit which was affected by the violations is all but gone.

To date, there has been no treatment by either the Board or the court of Keystone's alleged unfair labor

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NOTES *(Continued)*

were still so contaminated as to warrant a bargaining order . . ."); *Hedstrom Co. v. NLRB (Hedstrom I)*, 558 F.2d 1137, 1152 (3d Cir. 1977) (enforcement denied where the Board failed to consider what effect the passage of time would have on the possibility of having a fair rerun election); *NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 265 (3d Cir. 1982) (in banc) (*Gissel* order enforced only after Board, on remand, considered changes in bargaining unit together with passage of time).

practices that is probative of the central issue of lingering coercive effects under the circumstances which now prevail seven years after the election. While Keystone's past actions may have rendered the meaningful holding of the 1981 election impossible, it does not mean that the alleged unfair labor practices have sufficiently lingered to warrant a determination that a subsequent election could not be held which would be free from the adverse influence of Keystone's alleged prior misconduct. *NLRB v. Ship-Shape Maintenance,* 474 F.2d at 442. As the cases discussed above affirm, there are only two conceivable ways in which the coercive effects of unfair practices can "linger" so as to undermine free choice in a subsequent rerun election:

1. Those employees who would vote in the new election were exposed earlier to the unfair labor practices are still affected significantly by them; or

2. Those in charge of the employing entity remain substantially the same and can be expected to repeat prior misconduct even in the face of traditional Board sanctions and remedies.

It is axiomatic that without the presence of one or both of these conditions, there can be no inference, let alone presumption, that the preferred mechanism of a fair rerun election will prove unworkable. Neither the Board nor the Third Circuit fairly and realistically considered these factors.

It is of importance that the extraordinarily long delay in this case was not occasioned by procrastination or delaying tactics on Keystone's part, but rather was a function of the Board's inaction. The type of delay disapproved in *Gissel,* however, was fueled by the employer's overt "desire to gain time to dissipate [the union's majority] status." 395 U.S. at 583. There is no suggestion in the record, much less any finding, that

Keystone has been guilty of any delaying tactics calculated to dissipate the Union's majority status or otherwise. *Clark's Gamble Corp. v. NLRB,* 422 F.2d 845, 846-47 (6th Cir. 1970), *cert. denied,* 400 U.S. 868 (1970). Therefore, given the Board's quiescence between the hearing and its order, it is difficult to reconcile its stance, which has been approved by the Third Circuit, with *Gissel.*

Had Keystone been afforded the opportunity to reopen the record, there would have been no dispute that most of the employees in the unit the Union seeks to organize arrived on the scene well after the last of the alleged unfair labor practices. Far from attempting to come to grips with this relevant data and explain why the current workforce would be unable to express themselves freely in a secret rerun election, the Board flatly refused to consider Keystone's submission, preferring to rely on mere conclusory statements unsupported by the record. For its part, the court dismissed Keystone's argument as "familiar", but held it to be of no consequence, given the Board's right "to adopt the analysis" of the ALJ. (A-9). The effect is to thrust aside the Section 7 rights of the present employees, concentrating instead on the rights of the Union. Such a result turns the Act, and its self-evident policies and purposes, on its head.

Although the Board's conclusion that, "the employees' desire for union representation as expressed through the signed authorization cards would, on balance, be better protected by a bargaining order" (A-22), "glows with Supreme Court sanctioned terms", *NLRB v. Pilgrim Foods, Inc.,* 591 F.2d 1010, 1019 (1st Cir. 1978), that thinking fails to align with the current reality at Keystone. Indeed, the Board "indulges in the grossest kind of speculation to invoke *Gissell II", NLRB v. K&K Gourmet Meats, Inc.,* 640 F.2d 460, 469 (3d Cir. 1981), by its utter lack of concern for the rights of the majority of current employees who could be members of the bargaining unit and who, although not exposed to the

alleged unfair labor practices, stand to be deprived of any chance to register their wishes concerning Union representation.

By validating the Board's final directive to Keystone to bargain, a directive that is nothing more than the "litany, reciting conclusions by rote without factual explication", condemned by the Fifth Circuit in *NLRB v. American Cable Systems, Inc.*, 427 F.2d at 449, the Third Circuit has abandoned its statutory obligation to determine whether the Board's findings are supported by substantial evidence on the record as a whole – which plainly they are not. 29 U.S.C. §160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1950). Although the Board's choice of remedy "must . . . be given special respect by reviewing courts", *Gissel*, 395 U.S. at 612, n. 32, the courts are not rendered "automata". *See Universal Camera Corp. v. NLRB*, 340 U.S. at 489. Deference to the Board's expertise does not require abdication of its conventional review function since, "Congress has imposed on [courts] responsibility for assuring that the Board keeps within reasonable grounds." *Id.* at 490. The Third Circuit's failure to exercise its review function has dealt a fatal blow to "the integrity of the administrative process." *Atchison T&S Ry. v. Wichita Board of Trade*, 412 U.S. 800, 809 (1973).

Because the vast majority of present employees and several of the key managers had nothing to do with the Union or with remote events and authorization cards gathered over seven years ago, the court's enforcement of the *Gissel II* order here, in addition to causing a stark conflict among the circuits, treads upon employee freedom of choice, a matter at the very core of our federal labor law. For the Court of Appeals to place its imprimatur upon the Board's choice of remedy in this case is to manifest a serious injustice to the current workforce. The inevitable result of the Third Circuit's failure to consider the events subsequent to the ALJ hearing is not

only in conflict with the predominant circuit decisions in similar cases, but it is antithetical to the philosophy and goals of our nation's fundamental procedures for determining majority will.

## CONCLUSION

For the foregoing reasons, Petitioner, Keystone Lamp Manufacturing Company respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

KLEINBARD, BELL & BRECKER

By:_____

PHILIP R. VOLUCK
1900 Market Street
Suite 700
Philadelphia, PA 19103
(215) 568-2000

*Attorneys for Petitioner Keystone Lamp Manufacturing Company*

Date: November 4, 1988

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 87-3663 and 87-3738

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KEYSTONE LAMP MANUFACTURING CORP.
Petitioner in 87-3663

v.

NATIONAL LABOR RELATIONS BOARD,
Petitioner in 87-3738

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ORDER

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Present: GIBBONS, *Chief Judge,* MANSMANN and COWEN, *Circuit Judges*

Keystone Lamp Manufacturing Corp. having moved for a third stay of the mandate in the above entitled case, and the National Labor Relations Board having filed an opposition to that stay, it is

ORDERED that the motion for further stay of the mandate be and is hereby denied.

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Chief Judge

DATED: October 13, 1988

# Supreme Court of the United States

No. A-222

KEYSTONE LAMP MANUFACTURING CORP.,
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

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ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 4, 1988.

s/ Wm. J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of September, 1988.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3663 and 87-3738

KEYSTONE LAMP MANUFACTURING CORP.

vs.

NATIONAL LABOR RELATIONS BOARD

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until September 11, 1988.

_____
Judge

Dated: August 26, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-3663

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Keystone Lamp Manufacturing Corp.
*Petitioner*

v.

National Labor Relations Board,
*Respondent*

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No. 87-3738

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National Labor Relations Board,
*Petitioner*

v.

Keystone Lamp Manufacturing Corp.
*Respondent*

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SUR PETITION FOR REHEARING

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Present: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, AND COWEN, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of

the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Chief Judge

Dated: July 6, 1988

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-3663 and No. 87-3738

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KEYSTONE LAMP MANUFACTURING CORP., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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Submitted Under Third Circuit Rule 12(6)
May 2, 1988
Before: GIBBONS, *Chief Judge*, and MANSMANN and COWEN, *Circuit Judges*
(Opinion Filed: May 2, 1988)

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**MEMORANDUM OPINION OF THE COURT**

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GIBBONS, *Chief Judge*:

Keystone Lamp Manufacturing Corp., the employer, petitions to review an order of the National Labor Relations Board. The Board cross-petitions for enforcement of its order. The Board found that the employer violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158 (1982), by interrogating employees about their union activities, asking employees not to attend union meetings, instructing employees to remove union buttons, creating the impression of surveillance of

union activities, threatening to go out of business if employees selected a union to represent them, soliciting grievances with an implied promise that they would be corrected if they voted against the union, and promising other benefits to discourage support for the union. The Board also found that the employer violated section 8(a)(3) and (1) of the Act, 29 U.S.C. §158, by discharging employees Abner, Eckhart, and Phillips for supporting the union.

The Board's order requires the employer to cease and desist from the unfair labor practices which it found, to reinstate Abner and Eckhart, and to make Phillips whole for any loss caused by her unlawful discharge. These provisions of the order are not disputed by the employer's petition. Employees Abner and Eckhart were reinstated, and have subsequently obtained other employment.

The Board found that the union represented a majority of the employees in the appropriate bargaining unit as of April 6, 1981, the day on which it demanded recognition. The union nevertheless lost an election conducted on July 22, 1981. The Board held that in view of the small size of the unit and the highly coercive and widely disseminated unfair labor practices, which affected almost one-third of the unit employees, an untainted election was unlikely, and a bargaining order was appropriate.

Since the employer does not contest the Board's findings with respect to interrogation, threatening reprisals, threatening to go out of business, solicitation of grievances, and promises of benefits, the order prohibiting such conduct in the future must be enforced. *NLRB* v. *Browning-Ferris Indus.*, 691 F.2d 1117, 1125 (3d Cir. 1982).

The order respecting reinstatement or other relief for discharged employees has become moot by virtue of subsequent events. The employer nevertheless contests the findings on which it was based, because it bears on

the appropriateness of the bargaining order. The record contains evidence that Abner, Eckhart and Phillips supported the union openly and vocally; that they signed authorization cards, attended meetings, and wore union buttons at work; that management was aware of their activities; that management was strongly opposed to the organization effort; that after Abner, Eckhart and Phillips were discharged another union supporter, DeLong, was threatened with a similar fate; that the discharges took place in the midst of the union campaign, shortly before the cutoff date for eligibility to vote in the election; that the discharges took place before a computer system became operative while work the discharged employees were performing was still required; that the discharges were inconsistent with past practice and stated policy of the employer on retaining employees whose jobs were eliminated by automation; and that new employees were hired to perform work for which the discharged employees were capable. The record, therefore, fully supports the Board's conclusion that Abner, Eckhart and Phillips were discharged because of their support of the union.

The employer contends, however, that even if the Board's findings are all supported by substantial evidence, we should nevertheless deny enforcement of the bargaining order because of changed conditions since the time of the disputed election. The employer makes the familiar contention that the Board had not given adequate reasons for the imposition of that remedy. *See NLRB v. Atlas Microfilming, Div. Seratfilm, Inc.*, 753 F.2d 313, 319 (3d Cir. 1985); *NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 259 (3d Cir. 1982) (in banc); *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981) (in banc), *cert. denied*, 455 U.S. 940 (1982); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 309 (3d Cir. 1980) (in banc), *cert. denied*, 450 U.S. 996 (1981) (*Hedstrom II*). While passage of time and turnover may be relevant to the Board's choice of remedy, the Board

may nevertheless conclude that past union activity, employer response to such activity, the continuing presence in the bargaining unit of employees subjected to that response, and the continuing presence of the same employer management make a bargaining order appropriate. Moreover, the Board may adopt the analysis of the administrative law judge in support of the need for a bargaining order. Given the small size of the bargaining unit, the intensity of the employer's anti-union surveillance and interrogation, the severity of penalties inflicted on those union supporters who were discharged, the closure threats, the solicitation of grievances, the presence in the unit of employees who were there at the time, and presence of the same managers, the Board reasonably concluded that the ordinary cease and desist, reinstatement and make whole remedies would not erase the effects of the employer's unfair labor practices in eroding the union's former majority status. The Board's bargaining order in this case is entirely consistent with the requirements for such orders which this court has recognized in the cases referred to above.

The Board's order will, therefore, be enforced in full.

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TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

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Chief Judge

NOT INCLUDED IN BOUND VOLUMES
Bethlehem, PA

## NATIONAL LABOR RELATIONS BOARD ORDER DENYING MOTION

## UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

| | |
|---|---|
| KEYSTONE LAMP MANUFACTURING CORP. | |
| and | Cases 4-CA-12250 |
| | 4-CA-12307 |
| UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC | Cases 4-RC-14652 |

## ORDER DENYING MOTION

On 30 June 1987 the National Labor Relations Board issued a Decision and Order in this proceeding,[1] finding that the Respondent committed numerous violations of Section 8(a)(1) of the Act during the Union's organizing campaign, that the Respondent laid off three employees in violation of Section 8(a)(3) of the Act shortly before the representation election, that a bargaining order was warranted to remedy the Respondent's extensive and pervasive unfair labor practices in this case, and that the Respondent therefore violated Section 8(a)(5) of the Act by unilaterally implementing a new evaluation system after the Union had requested recognition.

On 28 August 1987 the Respondent filed a motion for reconsideration and reopening of the record. In its motion, the Respondent contends that a bargaining

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1. 284 NLRB No. 74.

order remedy is no longer warranted because the passage of time, employee turnover, and the computerization of unit work have dramatically reduced and altered the composition of the unit and have erased the coercive effects of its unfair labor practices on the present unit employees. On 24 September 1987 the General Counsel filed an opposition to the Respondent's motion.

The Board having duly considered the matter.

The Respondent's motion for reconsideration and reopening of the record is denied as lacking in merit.

Dated, Washington, D.C., 30 September 1987.

By direction of the Board

Joseph E. Moore

Deputy Executive Secretary

DJS

284 NLRB No. 74

D–4534
Bethlehem, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KEYSTONE LAMP MANUFACTURING CORP.

and

Cases 4–CA–12250
4–CA–12307
4–RC–14652

UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC

## DECISION AND ORDER

On 30 December 1982 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and

1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's decision in this case, we do not rely on his gratuitous comments in fns. 20 and 25, characterizing certain complaint allegations as poorly drafted and certain representations

conclusions as modified,[2] to modify his remedy,[3] and to adopt the recommended Order as modified.

1. Contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) of the Act on five occasions when it questioned open and active union adherents. Instead, we find under all the circumstances that these interrogations were not coercive, following the standards of *Rossmore House.*[4]

The judge found in section III,B,2 of the decision that on 6 April 1981 Executive Director of Manufacturing Fisher asked employee DeLong why she was wearing a union pin. DeLong did not reply. The judge also found in section III,B,3,a that on 3 April 1981 Director of Fabricating and Production Hawk lifted the lapel of employee DeLong's jacket where she was wearing a union button and asked her what the pin said, what it stood for, and where he could get one. When DeLong did not reply, Hawk laughed and walked away. The judge found futher in section III,B,3,b that on 3 April 1981 Hawk approached employee Zinggeler, referred to her union button, and asked her where he could get one.

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in the General Counsel's brief to the judge as misleading, because these comments have no bearing on our decision.

In par. 2 of sec. III,A of his decision, the judge incorrectly stated that the union organizing campaign began in March 1980, rather than in March 1981. We therefore correct this inadvertent error.

2. In adopting the judge's decision, we find it unneccessary to pass on the exceptions to his disposition of the interrogation allegations set forth in sec. III,B,1,c and 1,d of the decision, involving conversations between President Glover and employee DeLong, because any finding of an 8(a)(1) violation would be cumulative with no effect on the remedy in this case.

3. In accordance with our decision in *New Horizons for the Retarded,* 283 NLRB No. 181 (May 28, 1987), interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

4. 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985).

Hawk then asked her what this was all about and said, "What do you people want: wages? benefits? Well, you are not going to get it." Finally, the judge found in section III,B,4,d that in mid-April 1981 Administrative Assistant to the President Kern observed employee Eckhart's union button, which stated, "JOIN UNITED STEELWORKERS," and asked her, "Join? Join what?" When Eckhart responded, "The United Steelworkers," Kern asked her what that was. Eckhart did not reply.

The judge found that all four of these conversations were unlawful interrogations because the Respondent questioned employees about their union buttons for no legitimate purpose and without providing any assurances against reprisals, citing *PPG Industries.*[5] We disagree. The Board overruled the per se rule of *PPG* in *Rossmore House* and returned to the *Blue Flash*[6] test for evaluating whether an interrogation violates the Act: whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the Act. Here, the Repondent questioned active union supporters who were wearing union buttons openly at work, directing its questions only at the meaning of the buttons and why the employees were wearing them. As there were no other coercive circumstances surrounding these four interrogations, we find the questioning did not violate Section 8(a)(1) of the Act. Therefore, we dismiss these allegations.

The judge found in section III,B,5 of the decision that on 10 April 1981 Assistant Controller Thomas summoned employee Elaine Ahner to his office to present the Respondent's position on the union organizing campaign and to discuss the mechanics of collective bargaining. During this conversation, Thomas asked

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5. 251 NLRB 1146 (1980).

6. 109 NLRB 591 (1954). See also *Sunnyvale Medical Clinic,* 277 NLRB No. 131 (Dec. 23, 1985).

Ahner what the Union could do for her. Ahner responded that it could provide "fair and honest representation." Thomas then asked what she thought wages would be, and Ahner replied, "Higher." At that time, Ahner had already signed a union card, had attended several union meetings, and had started wearing a union button to work three or four times a week. The judge found that Thomas questioned Ahner about what she expected to gain through union representation and thus violated Section 8(a)(1) of the Act. We disagree. Thomas knew Ahner was an open and active union supporter, and his questions were directed only at discovering her reasons for supporting the Union so that he could argue more effectively in presenting the Respondent's case against union representation. The judge specifically found that Thomas did not make any threats or promises during this conversation. Under all the circumstances, we find that the questioning did not violate Section 8(a)(1) of the Act. Therefore, we dismiss this allegation.[7]

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7. Chairman Dotson would not find that Bernice Kern, administrative assistant to the president, in a conversation with employee Patricia Eckhart unlawfully threatened that the Respondent might go out of business. Shortly after a meeting on the rising cost of overhead, Kern commented to Eckhart, "Well, we can't stay in business forever." Eckhart asked what she meant, and Kern replied, "Well I am afraid if the union comes in, the company could go out of business." In no other conversation did Kern or any other Respondent official allegedly threaten to close if the Union won the election. Under these circumstances, Chairman Dotson finds Kern's remark to represent an isolated expression of opinion by a supervisor, who was concerned by the Respondent's acknowledged escalating costs, and would dismiss the complaint allegation.

Similarly, Chairman Dotson finds lawful Personnel Director John Lasky's remark to employee Ahner and Eckhart that the employees should give the Respondent "a second chance" and that, if things did not improve in a year, they could petition again for union representation. The two employees saw Lasky in the parking lot and invited him to join their conversation, and the three of them talked for about an hour, only a small part of which was devoted to discussing the Union. Lasky in no way threatened the employees

2. The General Counsel has excepted to the judge's failure to discuss whether or not the remarks made by Respondent Controller Gary Smith in numerous conversations with employees between April and July 1981 violated Section 8(a)(1) of the Act, as alleged in paragraph 6 of the complaint. Based on an admission in Controller Smith's testimony, we find that the Respondent unlawfully created the impression that its employees' union activities were under surveillance, as alleged in paragraph 6(f) of the complaint. We find it unnecessary to pass on the remaining allegations in paragraph 6 of the complaint, however, regarding unlawful interrogations, threats, and promises of benefits, because any findings of 8(a)(1) violations would merely be cumulative with no effect on the remedy already ordered and would require a remand to the judge for further credibility resolutions.

In his testimony, Controller Smith admitted that sometime in May 1981 he had a conversation with employee Phillips, a known union activist who wore a union button to work nearly every day, when she came to his office to deliver reports. Smith admitted saying, "I understand that your attendance at your meetings is dropping," and testified that Phillips responded, "I'll never tell." Employee Phillips testified that this conversation occurred the morning after a union meeting. By telling a union activist on the day after a union meeting that he understood attendance at her meetings was dropping, Smith clearly implied that the Respondent knew what was happening at these union meetings and created the impression that the employees' union activities were under surveillance. Such a statement violates Section 8(a)(1) of the Act. See *Airport Distributors*, 280

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NOTES *(Continued)*
during the conversation. Under these circumstances, Chairman Dotson finds that Lasky's remarks constituted an expression of his own opinion and, contrary to the finding of his colleagues and the judge, did not constitute an implied promise of benefits.

NLRB No. 91, slip op. at 11 (June 30, 1986), and *David's,* 271 NLRB 536, 552 (1984)[8].

3. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees Elaine Ahner, Jeanette Eckhart, and Betty Lou Phillips. In the decision, however, the judge did not clearly identify the facts he relied on to find a prima facie case supporting his conclusion that these layoffs were discriminatory. Therefore, we shall set forth the factual findings necessary to support his conclusion on this point.

First, we find that Ahner, Eckhart, and Phillips were open and active union adherents. Ahner signed a union card in March 1981, attended union meetings regularly after that, and wore a union button to work three or four times a week from early April until her layoff on 6 June 1981. Eckhart was one of three employees who initially contacted the Union in March 1981, signed a union card in March 1981, attended the weekly union meetings regularly after that, testified at the Board hearing on the Union's petition in late April 1981, and wore several different union buttons to work regularly from early April until her layoff on 26 June 1981, including one large button that stated she was a "VOLUNTEER

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8. Chairman Dotson would not find that Controller Smith's comment to employee Phillips created an impression of surveillance in violation of Sec. 8(a)(1). There is no evidence that Smith obtained his information about the union meeting in a surreptitious or otherwise unlawful manner. In fact, it is quite possible that the scheduling of the union meeting was common knowledge at the plant and that Smith innocently learned about the attendance of the meeting from an employee or other management official. Further, Smith's offhanded comment to Phillips, a known prounion supportor and activist, about the attenance was unaccompanied by any threat or other unlawful conduct. In these circumstances, Chairman Dotson finds no basis for concluding that Smith in any way interfered with, restrained, or coerced Phillips in the exercise of Phillips' Sec. 7 rights, and he would dismiss the complaint allegation.

ORGANIZER." Phillips signed a union card in March 1981, attended union meetings regularly after that, and wore a union button to work almost every day from early April until her layoff on 26 June 1981. The Respondent admitted seeing these employees wearing union buttons at work, and Controller Gary Smith testified that Phillips was known as "Norma Rae."

We also find that the Respondent exhibited animus toward its employees' union activities. Thus, the judge found that in early April President Glover ordered Phillips to remove her union button whenever she entered his office. The judge also found that the Respondent asked employees to stay away from union meetings, threatened employees with reprisals if they attended union meetings, and threatened to go out of business if the Union won the election. Finally, the judge found that in July, after Ahner, Eckhart, and Phillips were laid off, Supervisor Foster asked union supporter DeLong where her union button was and told her she "would get the ax next, just like all the others."

We further find that the Respondent selected these three employees for layoff contrary to past practice and using the implementation of the new computer system as a pretext. The judge found that in the past the Respondent had never laid off any clerical employees even though clerical jobs had been eliminated. Thus, in January 1981 several clerical employees were reassigned to other jobs when the new computer system began handling production control and eliminated their jobs; and in March 1981 Elaine Ahner was reassigned to another job when the product line for which she did cost accounting was discontinued. Moreover, the Respondent restated this policy of reassignments rather than layoffs at least twice during the union organizing campaign. On 25 March 1981 President Glover assured employees that they would have job security and the Company would continue its past practice of finding

other work for them if their jobs were eliminated, during one of his speeches arguing against union representation. At the Board representation case hearing in late April 1981, Supervisor Hinkle testified that although keypunching would be eliminated under the new computer system, the Respondent planned to find its keypunch operators other work to do. Futhermore, the Respondent laid off Ahner, who had been assigned to do keypunching 3 weeks before it laid off temporary employee Meleski, even though Meleski continued to perform keypunching after Ahner's layoff on 6 June 1981 and it had told Meleski she would only work until 1 June 1981. Finally, the Respondent recalled Meleski and hired a new clerical employee in October 1981 without recalling either Ahner or Eckhart.

We also note that the timing of these three layoffs indicates they were discriminatory. Thus, all three layoffs occurred in June, before the 28 June cutoff date for eligibility to vote in the union representation election and before the new computer system was fully operational. Moreover, Phillips was recalled to work on 20 August 1981, after the election, although she had been told her layoff was permanent.

Therefore, we agree with the judge that the Respondent selected these employees for layoff because of their union activities, that there was work available for them to do after their layoffs, and that the new computer system was a convenient pretext for their layoffs. The Respondent has excepted to the judge's failure to discuss the testimony of Computer Consultant Van Arsdale, who conducted a study of the Respondent's operations in April 1981 and recommended that certain clerical jobs would necessarily be eliminated under the new computer system. The Respondent contends that the laid-off employees' union activities could not have played any part in its decision to select them for layoff because it relied on Van Arsdale's recommendations in deciding which jobs to eliminate. We do not find this

argument persuasive, however, in view of the judges findings that the Respondent had a past practice of reassigning clerical employees to other work if their jobs were eliminated.

4. We also agree with the judge that the Respondent did not violate Section 8(a)(3) and (1) of the Act by laying off employee John Gellis. In adopting this conclusion, however, we do not rely on the judge's discussion of an agreement between the parties, supposedly reached at the representation case hearing in late April 1981, that Gellis would be excluded from the office clerical unit as a plant clerical, because the record establishes that there was no such stipulation. Although the Respondent took the position at the representation case hearing that Gellis was a plant clerical, his status was not resolved until the Regional Director issued a decision on 2 July 1981 finding him ineligible.[9] In dismissing this allegation, we note that, unlike the other three laid-off employees, Gellis did not wear a union button to work and only attended one union meeting. Furthermore, there is no evidence that the Respondent had a past practice of reassigning its plant employees to other work instead of laying them off if their jobs were eliminated, as it had for its office employees. Finally, we note that the Respondent had sound performance-related reasons for retaining the other two plant clerical employees instead of Gellis when it selected him for layoff.

5. The judge concluded that a bargaining order was warranted to remedy the Respondent's extensive and pervasive unfair labor practices in this case. The judge

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9. In sec. III,B,8,b of the decision, the judge also relied on this supposed agreement that Gellis was ineligible to support his discrediting of Gellis in connection with the dismissal of an 8(a)(1) allegation. In adopting the credibility resolution, we do not rely on the judge's discussion of this nonexistent agreement but rather on the other independent factors he used to make this credibility determination.

found that the Union had obtained signed authorization cards from at least 13 of the 22 unit employees by 6 April 1981, the date when it demanded recognition from the Respondent. The judge further found that the Respondent's unlawful conduct had neutralized the effectiveness of conventional Board remedies and had created an atmosphere in which it was unlikely that a fair election could be held in the future, citing the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Although we agree with the judge that a remedial bargaining order is appropriate in this case, we note that the judge did not clearly place the Respondent's misconduct in either of the two categories identified in *Gissel* as warranting a bargaining order. Therefore, we shall do so. We find that the Respondent's unfair labor practices fall into at least the second category, which involves "less-extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."[10]

On learning that there was union activity among its office clerical employees, the Respondent immediately began an antiunion campaign designed to discourage its employees from supporting the Union. In the first 3 weeks of the union organizing campaign, the Respondent threatened to go out of business if the Union won the election, threatened employees with reprisals if they attended union meetings, asked employees to stay away from union meetings, coercively interrogated two employees, ordered an employee to remove her union button whenever she entered President Glover's office on business, and distributed two questionnaires to all unit employees soliciting their grievances under conditions implying that these grievances would be redressed if the Union lost the election. In the remaining 3 months before the election, the Respondent promised employees that benefits would be improved if the Union lost the

10. Id. at 613.

election, created the impression that employees' union activities were under surveillance, laid off three employees because of their union activities, and threatened to lay off other employees because of their union activities.[11]

Such highly coercive unfair labor practices were likely to have had a profound impact on the employees. Threats of plant closure, termination, and other retaliation against union activities are clearly calculated to have a coercive effect that will linger. The termination of three employees certainly would have serious and prolonged consequences. Furthermore, the unit was small, with only 22 employees; the violations were widely disseminated; and the serious violations directly affected almost one-third of the unit employees.

We conclude that the possibility of erasing the effects of the Respondent's unfair labor practices using the traditional Board remedies is slight. Therefore, an election would not reflect uncoerced employee sentiment. Although there has been a significant passage of time since the violations occurred, this does not warrant withholding a bargaining order in light of the seriousness of the violations and their impact on the entire unit. Thus, we conclude that the employees' desires for union representation as expressed through the signed authorization cards would, on balance, be better protected by a bargaining order.

Accordingly, we shall order the Respondent to bargain with the Union as the duly designated representative of the employees in the unit found appropriate. The bargaining order shall be effective 6 April 1981, the date of the Union's demand for recognition, because this

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11. Although, as stated supra, Chairman Dotson would not find all of the 8(a)(1) violations found by his colleagues, he nevertheless agrees with his colleagues that a bargaining order is warranted to remedy the remaining violations committed by the Respondent.

occurred after the Respondent had embarked on a clear course of unlawful conduct.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Keystone Lamp Manufacturing Corp., Bethlehem, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(f) and reletter the subsequent paragraphs accordingly.

"(f) Creating the impression that employees' union activities were under surveillance."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 30 June 1987

Donald L. Dotson, *Chairman*

Wilford W. Johansen, *Member*

James M. Stephens, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

## APPENDIX

## NOTICE TO EMPLOYEES

**Posted by Order of the**
**National Labor Relations Board**
**An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees about union activities.

WE WILL NOT ask our employees not to attend union meetings.

WE WILL NOT order our employees to remove their union buttons.

WE WILL NOT threaten our employees with reprisals if they attend union meetings.

WE WILL NOT threaten to go out of business if the Union becomes our employees' bargaining representative.

WE WILL NOT threaten to terminate our employees because of their union activities.

WE WILL NOT solicit our employees' grievances under conditions implying that we will redress these grievances if the Union loses the election.

WE WILL NOT promise our employees that their benefits will be improved if the Union loses the election.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT tell our employees that we have laid off other employees because of their union activities.

WE WILL NOT lay off or refuse to recall any of our employees because of their union activities, or in any other manner discriminate against our employees with respect to their wages, hours, or terms and conditions of employment.

WE WILL NOT refuse to bargain in good faith with

United Steelworkers of America, AFL–CIO–CLC as the exclusive representative for the purpose of collective bargaining of the employees in the appropriate unit set forth below. The appropriate unit is:

> All office clerical employees employed by the Employer at its Slatington, Pennsylvania facility, including keypunch operators, order entry clerk, computer operator, payroll clerk, and time recordkeepers, and excluding production and maintenance employees, shipping clerks, production control employees, time study technicians, managers, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally change our unit employees' wages, hours, or terms and conditions of employment without first notifying and bargaining with United Steelworkers of America, AFL–CIO–CLC.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Elaine Ahner and Jeanette Eckhart immediate reinstatement to their former jobs or, if those jobs are not available, to substantially equivalent jobs, without loss of seniority or other benefits.

WE WILL make Elaine Ahner, Jeanette Eckhart, and Betty Lou Phillips whole for any loss of earnings they may have suffered by reason of our discrimination against them, with interest.

WE WILL, on request, bargain with United Steelworkers of America, AFL–CIO–CLC as the exclusive representative of our employees in the appropriate unit set forth above, with respect to wages, hours, and other

terms and conditions of employment and embody any understanding reached in a signed, written agreement.

KEYSTONE LAMP
MANUFACTURING CORP.
(Employer)

Dated _____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Independence Mall, 7th Floor, 615 Chestnut Street, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643.

Bethlehem, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

KEYSTONE LAMP
MANUFACTURING CORP.

and

Case Nos. 4-CA-12250
4-CA-12307
4-RC-14652

UNITED STEELWORKERS
OF AMERICA,
AFL–CIO–CLC

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JD-559-82

Bethlehem, PA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

| | |
|---|---|
| KEYSTONE LAMP MANUFACTURING CORP. | |
| and | |
| UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC | Case Nos. 4-CA-12250 4-CA-12307 4-RC-14652 |

*Gail Lopez-Henriquez, Esq. and Bruce G. Conley, Esq.*, of Philadelphia, PA, for the General Counsel.

*Barry F. Bevacqua, Esq. (Pechner, Dorfman, Wolffe, Rounick and Cabot)*, of Philadelphia, PA, for the Respondent.

## DECISION

### Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: Upon an initial unfair labor practice charge filed on July 13, 1981, a consolidated complaint issued on August 31, 1981, which, as amended, alleged that the Respondent engaged in various independent violations of Section 8(a)(1) and violated Sections 8(a)(3) and (1) of the Act by several acts of union-related discrimination. It was alleged further that by virtue of said unfair labor practices, Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as exclusive representative of a majority of its employees in the appropriate unit in accordance with the principles

enunciated in *N.L.R.B.* v. *Gissel Manufacturing Company,* 395 U.S. 575 (1969). Finally, it was alleged that Respondent engaged in further 8(a)(5) violations by effecting unilateral changes in working conditions without, first, notifying and negotiating in good faith with the Union. In its duly filed answer, Respondent denied that any unfair labor practices had been committed.

The afore-described complaint issued against a background showing that an election petition had been filed by the Union in Case No. 4-RC-14652 on April 6, 1981. Thereafter, pursuant to a Decision and Direction of Election issued by the Regional Director for Region 4 on July 2, 1981, an election by secret ballot was conducted on July 20, 1981, in the unit determined to be appropriate. Upon conclusion of said election, the parties were furnished a tally of ballots which showed that, of 22 eligible voters, 7 cast valid ballots for, and 12 against, representation by the Union. There were 3 challenged ballots, which were plainly insufficient to affect the results. Thereafter, the Union filed timely objections to employer conduct interfering with the election. Pursuant thereto, on August 27, 1981, the Acting Regional Director for Region 4, issued a "Supplemental Decision on Objections to Election" in which it was concluded that objections 1, 2, 3, 4, 5, 6, 7 and 13[1] were the subject of unfair labor practice charges in Cases No. 4-CA-12250 and 4-CA-12307, and, accordingly, as a complaint was to issue on those charges, it was ordered that said cases be consolidated for hearing, ruling and decision by the administrative law judge.

Pursuant to the foregoing, the matter was heard by the undersigned in Bethlehem, Pennsylvania, on June 7, 8, 9, 14 and 15, 1982. Upon conclusion of said hearing, briefs were filed on behalf of the General Counsel and the Respondent.

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1. Objections 8 through 12 had been withdrawn by the Union.

Upon the entire record in this proceeding, including direct observation of the witnesses while testifying and their demeanor, and consideration of the post-hearing briefs, I hereby make the following:

## Findings of Fact

### I. Jurisdiction

Respondent is a Delaware corporation engaged in the manufacture of portable lamps from its facility located in Slatington, Pennsylvania, the sole facility involved in this proceeding. In connection with said operations, Respondent, during the calendar year preceding issuance of the complaint, sold and shipped products valued in excess of $50,000 directly to points located outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

### II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that United Steelworkers of America, AFL-CIO-CLC, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

### III. The Alleged Unfair Labor Practices

#### A. Overview

This consolidated complaint arises from an initial organization campaign waged among Respondent's previously unrepresented office clerical employees at its production facility located in Slatington, Pennsylvania. It appears that the production and maintenance workers at that facility, a unit numbering about 350, had been continuously represented by the Union since 1962.

Organizational activity opened among Respondent's clerical employees in March 1980,[2] when Anita Zinggeler, Jeanette Eckhart and Darlene DeLong discussed that possibility with a union representative. Thereafter, with the aid of a list of names and addresses submitted by DeLong, blank authorization cards were mailed to the clericals on March 19. Between March 20 and March 25, some 15 employees signed and returned by mail to the Union their designations.[3]

Respondent was swift to respond, opening its counter campaign even prior to March 25, when the employees were assembled and addressed for the second time by Walter Glover, Respondent's president, in connection with the organizational effort. A third such meeting was conducted by Glover and other management representatives on March 30. This, despite the fact that the Union made no attempt to contact Respondent until March 31.[4] Later, on April 6, the Union by letter, formally requested negotiations as majority representative of a clerical-technical unit,[5] and filed an RC petition in Case No. 4-RC-14652. It will be recalled that in that election held on July 20, the employees in the appropriate unit rejected union representation by a vote of 7 to 12.

The General Counsel alleges that the results of the election were attributable to a pattern of unlawful conduct which precludes the holding of fair election in the

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2. All dates refer to 1981 unless otherwise indicated.

3. The critical date, by virtue of the instant complaint, for assessment of the Union's majority is April 6. At the hearing the parties stipulated that the appropriate unit as of that date consisted of 22 identified individuals. No possible question as to authenticity, eligibility or validity might be raised as to 13 of the fully executed authorization cards presented in evidence. This of course represented a majority of employees in the unit deemed appropriate by the Regional Director on July 2.

4. See General Counsel Exhibit 6(a).

5. See General Counsel Exhibit 7.

future even after the application of traditional Board remedies. It is urged in this instance that the valid authorization cards executed by a majority of the employees prior to the commission of any unfair labor practices "provides a better test of employee representation than a second election." Pursuant to *N.L.R.B.* v. *Gissel Packing Co., Inc., supra,* the General Counsel argues that the "unfair labor practices were sufficiently serious to warrant the imposition of a bargaining order."

The claim for relief in this form is supported by a complaint incorporating a plethora of independent 8(a)(1) allegations, as well as four layoffs allegedly violative of Section 8(a)(3). In this latter regard, Elaine Ahner was terminated on June 6 and Betty Lou Phillips, Jeanette Eckhart, and John Gellis, all were laid off on June 26. By way of defense, it is urged that no violations of 8(a)(1) were substantiated and that in each instance, the layoffs were uninfluenced by union activity or the impending election, but occasioned solely by a lack of work attributable to the installation of a new computer system to which the Company had become committed well prior to the advent of union activity.

In terms of remedy, the critical issues presented are whether the General Counsel has substantiated the basis for a *Gissel* bargaining order under the auspices of Section 8(a)(5) of the Act, and, if not, whether the Union's objections to the election in Case 4-RC-14652 have sufficient merit to warrant a rerun election. Beyond that, significance attaches to relief in the form of backpay and reinstatement derived from the alleged 8(a)(3) violations founded upon the June layoffs.

### B. Interference, Restraint and Coercion

The independent 8(a)(1) allegations relate essentially to (1) confrontations between rank-and-file employees and supervisors, (2) alleged changes in personnel practices, and (3) formal programs adopted by

Respondent allegedly to combat the Union. Thus, nine witnesses were presented by the General Counsel to testify to allegedly unlawful statements made by supervisors. The alleged violations of 8(a)(1) were placed as occurring throughout the pre-election period, but most appear to have taken place early in the campaign during March and April. In the main, the issues presented here turn upon credibility, but admitted borderline conduct is also involved presenting issues legal in nature.

**1. By Walter Glover**

a. Walter Glover is Respondent's president and the highest level operating functionary at the Slatington plant. It appears that he learned of the union campaign shortly after the Union mailed authorization cards to employees. It further appears that he addressed the clericals concerning the organization effort on three occasions in late March. His second speech, on March 25 was a hard hitting, emotional plea for rejection of the Union. This basic theme was carried forth to a third meeting held on March 30, and an 8(a)(1) allegation, derives from remarks admittedly made by Glover on that occasion. Thus, it is contended that Respondent independently violated 8(a)(1) because, at that time, Glover "solicited employees grievances, thereby promising employees increased benefits and improved terms and conditions of employment in order to discourage its employees from supporting the union." As was true of his March 25 address, Glover's remarks on March 30 emphasized the adverse effects of competition on the portable lamp industry and the Company's record in the areas of job security. However, on the later date, Glover also argued the disadvantages of unionization, pointing out the expense of dues and initiation fees, and the possibility of strikes. Following Glover's opening remarks, the assembled employees were then addressed by Gary Smith, Respondent's comptroller, who explored

the impact of enhanced costs upon the Company's welfare. Following this, Glover embarked upon a review of existing company benefits. To illustrate the desirability of Respondent's hospital plan, Glover called upon employee Pat Rehrig, who had just given birth to a child, to express her evaluation of the existing health program. However, she simply replied that it was "Okay", a response which obviously was taken by Glover as feint praise, causing him to react by stating: "Okay. Just okay? I happen to know its damn good." At this juncture, Glover continued on as follows:

> All right. Apparently I touched a touchy subject and I didn't mean to, I'm sorry. We will get into that and see what the hell is wrong and try to straighten it out for you. But this is the importance of communication. Now, how much of this very type of thing is in this room? This kind of feeling where people don't, really don't feel. We're not being told how and the hell they feel. Here's a young lady with a problem. I didn't know she had a problem. But dammit I'm going to find out why and try to do something for her. And the Union can't do any more for her than we will do. Now, if we haven't been aggressive enough, if my management hasn't been aggressive enough to find out and help you with these problems and explain it to you, then dammit I told you the door is open. My door is always open because I want you treated right. This money is spent. I wanted to put out booklet for a long time spelling out how you should use your Blue Cross, Blue Shield program. Because so many people don't know the benefits that are there and how to use them. Lots of people are still getting taken on the program. They're not taking advantage of what the hell is there for them. That goes for everybody throughout the plant. I put you all on a higher, higher intellect level than a lot of our people on the floor. And those people really need

help and if we're running into a situation like we just ran into with Pat, then we need help in this room too. All right. John, do you want to go through those benefits.

Upon consideration of the above in conjunction with the aforedescribed allegation of the complaint, it is concluded first that Glover said nothing that reasonably could be construed as a solicitation of benefits. He did not inquire as to employee problems or grievances nor did he invite any open exchange of views in that regard. The General Counsel does not expressly state that this was the case, but seems to argue that the vice in Glover's presentation was an implicit promise to remedy a grievance held by Pat Rehrig. Contrary to the General Counsel, unlike *Rexair, Inc.*, 243 NLRB 876, 880, the statements made by Glover did not in my opinion support a "compelling inference" that changes would be made in the existing benefit structure to accommodate Rehrig. See e.g., *Raley's, Inc.*, 236 NLRB 971, 972. His opening comment to Rehrig was obviously made in the anticipation that she would reinforce his own positive assessment of Respondent's existing hospital plan. True, he characterized her failure to respond favorably as indicating that Rehrig had a problem, which the Company could solve. That problem, however, was clearly defined by Glover as a misunderstanding on the part of Rehrig as to the scope of Respondent's Blue Cross, Blue Shield program. He in no way implied or suggested either a possible modification of the coverage of that program or that special benefits would be made available to Rehrig or any other employee. Glover's clearly communicated position was that Rehrig did not glow with enthusiasm concerning the plan because she did not understand it, that management was responsible for not communicating the scope of the plan accurately to Rehrig, that other employees might be laboring under a similar misunderstanding, and that management would redouble its

effort to avoid such misunderstandings. To this extent, his remarks did not exceed an area of employer anti-union propaganda, which has been acknowledged as privileged. Thus, Board precedent confirms the employer's right to campaign on the basis of existing benefits.[6] As an incident thereto, employers are not only free to clarify the existing benefit structure but to give assurances that it will continue to maintain an educational dialogue along those lines in the future. For these reasons, it is concluded that the allegation that Respondent violated Section 8(a)(1) through Glover's March 30 solicitation of grievances and implied promise of benefits is not substantiated and shall be dismissed.

b. The complaint further alleges that on or about April 6, Glover prohibited an employee from wearing a pin "which designated said employee's support for the Union." It is undisputed that Betty Lou Phillips wore a union pin from April 6 until her layoff on June 26. Also clear is the fact that during the campaign, in April, she delivered a report to the office of Glover while wearing her union button. Glover, observing the button, asked Phillips to remove it, stating "when entering through that door, I want that pin removed. This is my office. Is that understood?" Phillips apologized and never again wore the pin within Glover's office. She admitted, however, that this limitation did not extend in other areas of the facility where she freely wore her pin throughout the campaign. The General Counsel argues that although Glover's instruction was limited to the vicinity of his immediate office,". . . it nonetheless created an atmosphere which would tend to coerce the employee in her exercise of a protected right." In my opinion, the question presented is border line. It is true that the statement by Glover amounted to a strong expression of distaste for union activity and a desire to insulate his surroundings

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6. *Arrow Elastic Corporation*, 230 NLRB 110, 113, and cases cited at ftn. 13 thereof.

from its trappings. Such expressions of union animus, though perhaps coercive, would appear to fall with free speech guarantees protected by Section 8(c). More significantly, however, from a practical point of view it is difficult to imagine how Section 7 activity would tend to be either enhanced by intervention of the statute to guarantee Phillips the right to brandish union insignia within her boss's office or impaired by this limited restriction which plainly was inapplicable to areas frequented by employees. Nonetheless, it is my duty to apply Board policy, which in this area is not only established, but broad-brushed in terms of its proscriptive scope. Thus, restrictions of this nature are unlawful absent a showing of special circumstances indicating an interference with production, discipline or presenting a hazardous work condition.[7] No such showing having been made by Respondent herein, the instruction by Glover to Phillips violated Section 8(a)(1) of the Act.

c. The complaint alleged that on or about April 3, 1981, Glover "interrogated an employee regarding said employee's support for the Union." In this regard, DeLong testified that while on a stair case leading to the employees' lunchroom, she on April 3 crossed paths with Glover, who while observing her union button, stated "I can't believe it. Why Darlene? Why did you let it get this far? You of all people. I just can't believe it." According to DeLong, Glover then asked "what I had against the company."[8] On the face of DeLong's testimony, I am not convinced that a Glover engaged in coercive interrogation. From her account, his remarks were completely rhetorical and not of the type calculated to elicit a response. Thus, her testimony does not indicate that she made a response, or that she was given an opportunity to

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7. *Hesse Corporation*, 244 NLRB 985, 987.

8. Glover denied that he had any such conversation with DeLong. He admits to an exchange with employee Joanne Levandusky with a somewhat similar focus. I prefer the testimony of DeLong in this instance.

do so. Surprise is frequently couched in the language of the interrogatory, though inquiry is by no means intended. It was the General Counsel's burden to establish that the employee was in fact "interrogated", and as this proof responsibility was not met here, I shall dismiss the 8(a)(1) allegation in this respect.

d. The final allegation implicating Glover in 8(a)(1) activity pertains to a conversation with DeLong in his office on the day of the election, July 20. DeLong had previously been employed in the production and maintenance unit, and decided to return to that unit after learning that the Union had failed in the election. Later that day, but after the election, she was summoned to Glover's office where she was told first that she had been a good worker, and then asked by Glover "why did you do it?" DeLong indicated that she wanted job security whereupon Glover questioned this, asking whether she was aware of "how many clerical employees had been laid off?" According to DeLong, Glover also mentioned that she was held in such high esteem that if her supervisor had wanted to elevate her to the position of assistant supervisor, he would have approved. Glover then assertedly returned to a critical posture, stating "the leadership you had in this, you sit there and you don't have the balls to give me an explanation . . . we people had hurt him for the last time."[9] Based thereon, the complaint alleged that Glover interrogated DeLong regarding her union activities, and "implied a promise of promotion" to her in order to discourage her union support. The testimony of DeLong is too vague to support reasonable construction that a union related

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9. Glover admitted to such an encounter. He acknowledged that he expressed curiosity as to DeLong's reasons for resigning from the clerical unit in that her retransfer to the production and maintenance group rendered her automatically subject to layoff. Beyond that he could recall none of the conversation. I credit DeLong.

promise of promotion was made to her.[10] It is clear, however, that Glover questioned her concerning her union activity, that this occurred without required safeguards, and hence that it violated Section 8(a)(1). I so find.

### 2. By Donald Fisher

Fisher, at times material, served as Respondent's executive director of manufacturing. It is alleged that Respondent violated Section 8(a)(1) through his interrogation of an employee on April 6, and by his direction on April 8, that an employee remove a union button.

As to the first incident, Fisher confirmed the testimony of DeLong that on April 6 he ". . . asked her why she was wearing the pin." DeLong on that occasion afforded no response. The inquiry, having been made without safeguards providing assurances against coercion, and lacking in legitimate justification, was unlawful. I find that Respondent thereby violated Section 8(a)(1) of the Act. *PPG Industries, Inc., Lexington Plant, Fiber Glass Division,* 251 NLRB 1146 (1980).

With respect to the second incident, DeLong testified that about 2 months later on about June 8, she was called to the office of Fisher. When he observed her union button, he told her to: "Take if off". Although DeLong indicates that this instruction was unqualified as stated, she continued to wear the button in work areas, but did not consider this to be a violation of Fisher's instruction. Fisher, on the other hand, denied ever having a conversation with DeLong in which he

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10. The reference to the fact that Glover would have approved a promotion if recommended by a supervisor seemed purely hypothetical, and was conveyed by DeLong in such cryptic fashion as to suggest nothing other than Glover's recognition of her competence and outstanding performance as an employee in the clerical unit. I simply did not take DeLong's testimony to mean that Glover was thereby implying that his approval in any way hinged on her support, or lack of support for the Union.

prohibited her from wearing the union pin in or out of his office. He testified further without contradiction that DeLong during the entire pre-election period visited his office on a daily basis. In this instance, the testimony of DeLong is considered unreliable. That of Fisher seemed the more probable when viewed in the light of undisputed facts. Indeed, I consider it entirely unlikely that Fisher would have elected to make an issue over the insignia some 2 months after several employees within the clerical unit began wearing union buttons regularly. It was my overall impression that in this instance DeLong was either confused or failed to recall and relate all that actually transpired on that occasion. In any event, her testimony is rejected and accordingly, the evidence does not substantiate that Respondent violated Section 8(a)(1) in this respect.

### 3. By Jim Hawk

a. Hawk, at times material, was Respondent's director of fabricating and production. According to the complaint, Respondent independently violated Section 8(a)(1) through his separate interrogation of employees concerning union activity on April 3, and his solicitation of grievances under conditions implying a promise of benefit. The first was substantiated by testimony of DeLong, who related that on April 3, Hawk lifted the lapel of her jacket and inquired as to ". . . what the pin said, what it stood for, where he could get one." She went on to indicate that Hawk "laughed and walked away" when she refused to talk about it.[11] Although I have my own views as to this type of dialogue between a

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11. In this respect I credited the testimony of DeLong. Hawk did not deny the inquiry. I did not believe his effort to euphemize the conversation by indicating that DeLong frequently wore funny pins, that he had no idea that the pin she was wearing pertained to the Union, and that when he saw it he just bent down and asked her what it said.

supervisor and an employee who openly manifests union support, I am duty bound to adhere to Board precedent. In this regard I find that Hawk's expression cannot be excluded from the all-inclusive holding of the Board concerning "inquiries . . . (which) convey an employer's displeasure with employees' union activity," whose ". . . coercive impact is not diminished by the employees' open support of the union or by the absence of attendant threats."[12] Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by this seemingly innocent inquiry as to what the union button said.

b. Hawk was implicated in a second incident on April 3, which was founded upon testimony of Anita Zinggeler. Consistent with the pattern of conduct related by DeLong, Zinggeler testified that Hawk approached her on that date and referring to her union button, asking where he could get one. He went on to inquire as to what "this was all about" stating "what do you people want: wages? benefits? well, you are not going to get it." I prefer the testimony of Zinggeler, an encumbent employee at the time of the hearing, over Hawk's denial that he ever discussed union buttons with her or ever even observed her wearing such a button.[13] On the authority cited above, I find that Hawk's questioning of Zinggeler concerning her union button, constituted coercive interrogation and that Respondent thereby violated Section 8(a)(1).

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12. See *Harrison Steel Castings Company*, 262 NLRB No. 59, p. 3, and cases cited at fn. 5 thereof.

13. For reasons that should appear obvious, I dismissed at the hearing the allegation that Hawk in this conversation solicited grievances under conditions implying a promise of benefit. It is difficult to grasp just how such an allegation might be maintained in the face of Zinggeler's testimony that Hawk said that no enhanced benefits would be achieved.

**4. By Bernice Kern**

Kern, during the organization campaign held the position of administrative assistant to the president.

a. It is alleged that Respondent violated Section 8(a)(1) by Kern's attempt to dissuade an employee from engaging in union activity "by requesting said employee not to attend union meetings." In this respect, testimony was offered by former employee Patricia Eckhart to the effect that on the day following "one of the first union meetings", Kern inquired as to whether Eckhart had attended the meeting and as to what had transpired. Eckhart claims that she did not respond. According to Eckhart, Kern then stated ". . . I want to ask you as a personal favor to me if you would please stay away from the union meetings." Kern admitted to questioning Eckhart as to whether she attended, and also acknowledged that she expressed curiosity as to what transpired at the meetings. However, she denied having told Eckhart to stay away from meetings.[14] The interrogation by Kern concerning union activity was plainly coercive, and violated Section 8(a)(1). With respect to the alleged instruction that Eckhart refrain from attending union meetings, as stated by the undersigned at the hearing, the latter's testimony was merely indicative of a "non-instructive request". The parties were informed that no violation would be predicated thereon absent clear authority to the contrary. Upon further reflection, with the aid of legal arguments advanced by the General Counsel, I regard *Eau Claire Press Company*, 260 NLRB No. 148, JD p. 5, as dispositive and conclude that the Board

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14. On balance, I regarded Eckhart as the more credible witness. In so ruling, I have not overlooked the fact that, prior to the hearing, Eckhart voluntarily quit her employment. Eckhart also testified that about a week after this meeting, Kern asked her if she was planning to attend the next meeting. I am not entirely certain that this matter is embraced by the complaint, but if it is, I consider it to be cumulative to the unlawful interrogation already found against Kern and as having no effect upon the remedy.

has deemed such a request to have a tendency reasonably to coerce. Accordingly I find that Respondent thereby violated Section 8(a)(1) of the Act.

b. With respect to a further allegation, Eckhart testified that shortly after the meeting that had been held concerning the "rising cost of overhead",[15] she was proofreading orders with Kern in the latter's office, when Kern interrupted to state "well, we can't stay in business forever". Eckhart inquired as to what she meant. Kern indicated "well I am afraid if the union comes in, the company could go out of business."[16] Consistent with the position of the General Counsel I find this prediction did not satisfy the standard set forth in *N.L.R.B* v. *Gissel Packing Co., supra*, 395 U.S. at p. 6818. It was not ". . . carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . ." Accordingly, although the threat was seemingly an isolated expression of a supervisor's personally held fear, which was probably inspired by recently held management meetings stressing the problem of escalating costs in the highly competitive lamp industry, it nonetheless tended reasonably to coerce and hence violated Section 8(a)(1) of the Act.

c. Zinggeler testified to a further conversation with Kern which occurred in early April, Zinggeler described the incident as follows:

> . . . I was standing at the coffee machine and she came over to me and pointed to my button that I was wearing that said "JOIN, UNITED STEELWORKERS". And she said, "Join? Join what?" And I said "the United Steelworkers".

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15. See General Counsel's Exhibit 9(b).

16. Kern admitted to an observation that the Company could price itself out of the market, but denied adverting to the possibility that it could go out of business. I believed Eckhart.

> And she said, "Oh, I like mine better". She pointed to her button that said "I'D RATHER BE ME", and that is all she said.[17]

Zinggeler acknowledged that, under the circumstances, she was convinced that Kern knew full well what the button meant and that Kern was not interested in Zinggeler's response to her inquiry.[18] To label the incident described by Zinggeler as interrogation is to succumb to the entrancing notion that any statement that begins with an "interrogatory pronoun" and ends with a "question mark" is calculated to elicit a response. Dialogue is often marked by rhetorical questions which are neither understood as, nor conveyed with the intention of, seeking information from the listener. This is precisely what occurred here. If a violation has been established in this exchange, it must be founded upon the view that during an organization campaign supervisors may not lawfully make smartalecky comments about an employee's openly declared union sympathy. Although one might say that Kern's conduct was tantamount to an expression that she did not like the fact that Zinggeler was pro union, without more, authority does not compel a conclusion that such an intimation violates Section 8(a)(1). The allegation predicated upon Zinggeler's testimony in this respect shall be dismissed.

d. Jeanette Eckhart afforded somewhat similar testimony in support of a further 8(a)(1) allegation. The latter related that in mid-April, Kern observed Eckhart's union button and said "Join? Join what?". Eckhart responded "The United Steelworkers". Kern inquired as

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17. A replica of the button appears as General Counsel Exhibit 8(b). The "I'D RATHER BE ME" button was a response worn by those who opposed the organizational effect.

18. Kern afforded a slightly different version of the conversation. According to Kern, she ran into Zinggeler and stated where's your button, while pointing to her own, and indicating "I'm wearing mine, where is yours?"

to what that was. Eckhart did not answer.[19] In this instance, I find that Kern's statement did constitute "interrogation" and shall sustain the 8(a)(1) allegation to this effect.

e. The final allegation implicating Kern in coercive interrogation was based on testimony of Betty Lou Phillips, which in its entirety is set forth below:

General Counsel: Are you acquainted with Bernice Kern?

Phillips: Yes

General Counsel: And who is she?

Phillips: Supervisor of the Main office.

General Counsel: Did you have a reason to have contact with her in the course of your work?

Phillips: Yes. I was giving reports, also. Nothing further.

General Counsel: During the same time period, do you recall any conversations with her?

Phillips: There again, it is the same as with Hinkle. I mean, it was no big deal. We just laughed it off, really.

General Counsel: What was said?

Phillips: The company had put out pins that said "I RATHER BE ME" and Ms. Kern happened to be wearing the company pin, and I had the union pin on, and she said

19. Kern denied any such conversation, asserting that she did not get along with Eckhart and hence avoided her. Consistent therewith evidence reveals ill-will existed between them, but I credit Eckhart.

"Where is your pin?" and I said "I have mine on", and that was it.

General Counsel: That was the whole conversation?

Phillips: Yes. It was nothing.

It was the sense of Phillips' testimony that since April 6, she wore a union button everyday. It is also clear from the record that the "I'D RATHER BE ME" buttons did not appear until after the dissemination of union pins. Phillips acknowledged that there was much "kidding' about the Union between supervisors and herself, and she acknowledged that had Kern been observed without her pin, she might have made the same reference to Kern as Kern had made to her. It is difficult to conceive that this incident could have any real impact on the propriety of a bargaining order or that considering its cumulative nature, it could be of any remedial significance whatever. Nonetheless, the evidence is just as worthy of analysis as any other violation charged by this complaint. It is my impression from a composite of the testimony of Phillips and Kern that the latter's statement was calculated and understood solely to draw attention to Kern's own antiunion medallion. I find that Kern's comment on the occasion had no reasonable tendency to coerce and, accordingly, the 8(a)(1) allegations based thereon shall be dismissed.

**5. By Preston Thomas**

At times material, Thomas was Respondent's assistant controller. The complaint alleged that on about April 10, he coercively interrogated an employee, threatened said employee with a loss of benefits, and offered a permanent position to an employee if she withdrew support of the Union. The employee in question was Elaine Ahner, who at the time held the position of key punch operator. According to Ahner's testimony, she

was called to a conference with Thomas which he opened by inquiring as to how she liked her new assignment to key punch. According to Ahner, he then asked "what could the union do for me". She replied "fair and honest representation". When next he inquired as to what she thought wages would be, she replied "higher", while observing that there would be a "written guarantee of our benefits." Thomas then assertedly stated that "benefits would have to start from scratch, from the bottom, that we would have to start all over with our benefits; that we wouldn't get what the union had." According to Ahner he indicated variously, that if the Union came in, that employees would not have the same benefits as now, and that bargaining would have to start from scratch or at the bottom. Ahner also testified that Thomas indicated that because she was at the bottom of the seniority list, she would probably be laid off in August when the computer system was to be placed on line. Ahner also claims that in reference to her vulnerable position as a key punch operator, Thomas stated that he would offer her "a permanent position at Keystone, if I would change my mind about the Union." She claims to have looked at Thomas and replied "well, I don't know". Thomas assertedly then indicated "would you think about it?". Ahner indicated "maybe".

Thomas acknowledged that he met individually with Ahner to present the Company's position in connection with the union campaign. He claims to have proceeded in accordance with a preset "agenda" given to him by Gary Smith. He acknowledged that he discussed the mechanics of collective bargaining, but denied stating that the Company would come in "at the bottom". Instead he claims to have stated that if higher wages were sought, the Union might have to trade off some benefits, going on to point out that the Company would come forth with a proposal, which was not necessarily at the bottom, and from that, a compromise would be

negotiated. He denied ever having used the word "bottom", but admitted to indicating that existing company benefits were subject to negotiation. He denied offering Ahner a permanent position. He did admit to asking Ahner if the fact that she would be eventually laid off had bearing on her "making an objective decision on union representation. . . ." According to Thomas, when Ahner answered affirmatively, he decided that there was no point in continuing and he terminated the conference.

Although Thomas did not strike me as an impeccably credible witness, Ahner did not impress as capable of giving an accurate accounting of the precise words used by Thomas in describing the give and take aspects of collective bargaining. Furthermore, I did not believe her testimony that she was offered a permanent position if she signified a withdrawal of union support. The latter struck as too pat, while lacking a truthful ring. On the basis of credibility, I reject the allegations that Thomas either threatened loss of benefits if the union were designated, or offered a permanent position if Ahner withdrew her support from the Union. Nonetheless I am inclined to find that Thomas questioned her concerning what she expected from the Union, and by virtue thereof, Respondent violated Section 8(a)(1).

**6. By Ron Hinkle**

The complaint alleged that Respondent violated Section 8(a)(1) through Ron Hinkle's offer to consider changing an employee's work hours if she ceased activity on behalf of the Union.

In this connection, it appears that Jeanette Eckhart in January 1981 was reclassified to the position of payroll clerk. Previously, she had worked as a "timekeeper" and worked from 7 a.m. to 3:30 p.m. Hinkle, her supervisor, did not arrive until 8:00 a.m. In February, after Eckhart became payroll clerk, Hinkle told her that he wanted to

change her time to 8 to 4:30. Eckhart protested, indicating that the proposed change was "inconvenient" because it would interfere with her ride to work. She continued to report at 7:00 a.m. It is the sense of Eckhart's further testimony that, on or about March 27 "before 7 a.m.", Kern came walking through the office, and observed Eckhart, Zinggeler, and computer operators Bob Dieter and Bill Balliet engaged in conversation. Later that day a memo came out indicating that her time had been changed, and she met with and was informed by Hinkle to the effect that henceforth she would work from 8 to 4:30 p.m. Eckhart assertedly asked Hinkle whether there was a possibility that she could have her time changed back to 7 to 3:30. According to Eckhart, Hinkle responded "when all this is over, we will see what we can do about it." There is no evidence that Respondent suspected or knew of Eckhart's proclivities toward the Union as of March 30. In any event, Hinkle's account struck as the more probable. He admitted that he changed Eckhart's hours on or about March 30, but with little fanfare. He testified to simply having explained to Eckhart that because of the incident witnessed by Kern earlier that morning and the fact that during the first hour, Eckhart was unsupervised, he had been instructed to change her starting time to 8 a.m. Hinkle denied having made any statement to the effect that this decision would be reviewed in the future. Considering the fact that Hinkle previously sought this change in February, and Eckhart herself concedes to the incident observed by Kern that morning, it is entirely likely that the shift in hours was made by Hinkle pursuant to instruction from higher levels. In these circumstances, I consider it most improbable that Hinkle, whose role in the antiunion campaign appears to have been quite limited, would have made any comment holding out any possibility that this determination might be reversed or reconsidered after the union campaign.

Accordingly, I shall dismiss the 8(a)(1) allegations based upon Eckhart's testimony in this respect.

### 7. By Horace Brobst

Brobst is Respondent's director of shipping, warehouse, assembly, receiving and salvage. Obviously, his jurisdiction includes the shipping department which is subject to the immediate supervision Keith Cebrosky. According to shipping department employee, John Gellis, Brobst in early April came into his work area and stated that he had heard that there was a union meeting the night before. Gellis answered "yes", whereupon Brobst allegedly asked if Gellis had attended. Gellis again answered in the affirmative, whereupon Brobst assertedly asked whether Gellis was for or against the Union. Gellis indicated that he did not know and was not sure. At this point, a co-worker, Linda Schuler expressed her own opinion as to why employees might be for the union, including the fact that many, with seniority, were concerned that the new computer system would eliminate their jobs.

Brobst could not recall having such a conversation with Gellis, while explicitly denying that he questioned Gellis about union activity or that he ever inquired concerning Gellis' feelings in that regard. In this instance, I am willing to give Respondent the benefit of the doubt and shall reject the uncorroborated testimony of Gellis. The allegation that Respondent violated Section 8(a)(1) in this respect shall be dismissed.

### 8. By Keith Cebrosky

a. As indicated Cebrosky was the front line supervisor in the shipping department, who reported to Brobst. Gellis testified to several encounters with Cebrosky, his immediate supervisor. Gellis first related that in April, on the day of a union meeting, Cebrosky came to his desk and stated "you are not going to that union

meeting tonight, are you?" Gellis failed to respond, whereupon Cebrosky allegedly injected: "cause if you are, I will be very angry and you won't like me in the morning." Gellis asserted that Linda Schuler heard the statement, and in a raised voice rejoined: "No one is going to tell us what to do."

Cebrosky appears to deny questioning Gellis concerning the meeting, but admits to the balance of Gellis' account of that conversation. Cebrosky claims, however, that this was just an extension of the kidding that took place between him and Gellis every morning. However, he acknowledged that his remark was taken seriously by Gellis. It is noted in this connection that, according to the account of Gellis, Schuler reacted as if she too failed to take Cebrosky's remark in a joking matter. I credit Gellis, and find that Respondent violated Section 8(a)(1) by Cebrosky's coercive interrogation concerning Gellis' plans to attend the union meeting, as well as his further statement warning that unspecified reprisals might be taken against Gellis were he to attend.

b. Although Cebrosky testified that he never again discussed the Union with Gellis, the latter testified that following the pre-election hearing on April 28 or 29, he and co-workers Schuler and Gayle Pope met with John Lasky, Respondent's personnel director and Gary Smith, the comptroller. Apparently, Respondent sought to exclude all 3 from the unit, and at this meeting sought to explain to them what had transpired in this regard at the aforesaid hearing. According to Gellis, the three employees manifested disinterest. Apparently, at the end of work that day, Cebrosky was summoned to Glover's office. Gellis, apparently connected the two and asked Cebrosky whether he had gotten into trouble because of the behavior of the employees at the meeting. Cebrosky allegedly responded that he had in fact been called in because Glover learned that employees were bored at the meeting, and Glover "wanted to know what was going

on." Cebrosky assertedly told Gellis that he then informed Glover as to his suspicions concerning the union sentiment of Schuler and Gellis, informing Glover that Gellis ". . . is a young guy and he is not getting paid very much . . . He had been here almost 3 years, and Gayle Pope has only been here 2 years . . . He was here a year longer and she is getting paid more than him, and why wouldn't he be for the union?"

Cebrosky admits to being called to Glover's office, and to Gellis' having inquired as to whether he was in any kind of trouble with Mr. Glover concerning the Union. Cebrosky claims that he informed Gellis that he "was called up to Mr. Glover's office and it wasn't even anything about the union." He went on to explain that he simply had been "chewed out" by Glover because of a job discrepancy. In this instance, the testimony of Gellis is rejected. Thus Gellis indicated that a determination had been made pursuant to agreement of the parties at the pre-election hearing that he was ineligible to participate in the election because he held the status of a plant clerical, rather than an office clerical. He indicates that at least by May 1, he knew of his ineligibility. It is fair to infer that Glover and Cebrosky were equally mindful of this fact and in the light thereof, Gellis' allegiances would have been academic at the time of this alleged conversation. His account is deemed improbable. Accordingly, I shall dismiss the allegation that Respondent thereby created the impression that union activity was subject to surveillance.[20]

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20. This allegation exemplifies a counter-productive effort to compartmentalize alleged misconduct within conventionally accepted description of unfair labor practices. Contrary to the relevant allegation in the complaint, were Gellis' testimony credited, the comments imputed to Cebrosky involved a direct acknowledgement, rather than creation of any "impression", that Gellis' union leanings were under discussion. Furthermore, it is difficult to imagine as to how on Gellis' account one could deduce that

**9. By Fred Foster**

a. It is alleged that Respondent violated Section 8(a)(1) through Fred Foster's coercive interrogation, and threat of discharge. Darlene DeLong was offered to substantiate the charges implicating Foster. The latter apparently was a low level supervisor, who recently had been upgraded from quality control inspector to a supervisor in the production and maintenance unit in December 1980.[21] DeLong, who before becoming a office clerical, had a long history of employment in the production and maintenance unit, and who was friendly with Foster testified that during the second week of July,[22] Foster approached her at her work station, and inquired as to where her union pin was, going on to state that DeLong ". . . was the next to go, that . . . (she) would get the ax next, just like all the others." Foster conceded as to the possibility that if DeLong was not wearing her pin, he might have asked her where it was. He denied using the words, "you are the next to go", but explained his belief as to what was said as follows:

> There was a whole lot of kidding going on between some of the girls and some of the supervisors. And I believe I made a statement that she better watch that she doesn't get the axe next. It was laid off or fired. The rumor was sort of who was going to get the axe.

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NOTES *(Continued)*

surveillance was in any sense the source of management's knowledge in that regard. The tactic of the General Counsel whereby incidents are placed under familiar *per se* labels might well be a substitute for thoughtful analysis at the prosecutorial level, but hardly enhances efficiency within the overall administrative process.

21. Quality control as a separate department was phased out in April 1981.

22. The plant was closed during the first 2 weeks of July. DeLong, however, was among certain clericals who worked during the shutdown.

I credit DeLong. It will be recalled that as of June 26, at least three members of the office clerical unit had been laid off. The fact that Foster and DeLong enjoyed a longstanding friendship and from his perspective the remark was in a kidding or teasing vein does not remove the sting from his expressed view that DeLong was to be singled out to join those clericals already terminated in the wake of the new computer system.[23] Based upon the credible testimony of DeLong, I find that Respondent violated Section 8(a)(1) through Foster's coercive interrogation, and his threat implying that DeLong could be selected for termination because of her union activity.

b. By virtue of an amendment to the complaint, it is further alleged that Respondent violated Section 8(a)(1) in late April or early May when Foster informed an employee that another had been laid off because of union activity. DeLong attested to this mid-April encounter. Despite it seriousness, unlike other matters to which DeLong testified, this allegation was not included in the complaint initially but added some 10 months later. In any event, in this respect, DeLong testified that while she and Foster were having coffee in the employee lunch room, DeLong asked "what happened to your buddy?", a reference to Foster's friend, Glenn Shoff, a quality control inspector who had been laid off on the previous Friday. In response Foster assertedly stated "he wore a union pin. That's why they got rid of him. They didn't lay him off because they eliminated his job."[24]

Foster admitted to a conversation in April after Shoff was laid off. He claims that it centered on the fact that

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23. Respondent sought to mitigate Foster's remark through an observation that it somehow related to the phasing out of the quality control department. It will be recalled that the quality control function ceased to exist after April 8, 1981, and DeLong had been removed from that department in the Spring that year.

24. The quality control inspectors were excluded from the production-maintenance unit. historically, represented by the workers.

Shoff was the last of the inspectors employed and the fact that Foster was pleased that he had moved into supervision when he did because, if not, he would have suffered the same fate as Shoff. Foster denied any reference to union buttons and further denied having made any statement that Shoff was fired because he wore a union button. In this instance, the testimony of Foster is preferred as the more probable. I credit his denials and shall dismiss the somewhat belated allegation that Respondent violated Section 8(a)(1) through any statement on the part of Foster that an employee had been terminated because he manifested union support.

**10. The Parking Lot Incident**

The complaint alleged that Respondent violated Section 8(a)(1) on about May 1, by John Lasky's solicitation of employee grievances, thereby promising increased benefits and improved conditions of employment to discourage employees from supporting the union. The allegation was subject to substantiation through testimony of Elaine Ahner and Jeanette Eckhart. Both testified that after work in early May, they were in the parking lot, when they spotted Lasky, and invited him to join them. A composite of the testimony of Eckhart and Ahner indicates that the conversation lasted about an hour and that all three at some point embarked upon a discussion of the Union, with Lasky making the appeal that the Company be given "a second chance", while arguing that if things didn't improve in a year, the employees could petition for the Union again, adding that in such a case the chance of success would be greater. Other than the fact that Gary Smith later joined them, there appears to be nothing of further significance to have transpired during this conversation. Lasky acknowledged that the union was discussed on that occasion, though a very small segment of the entire

conversation. He acknowledged that he discussed the mechanics of collective bargaining and that Eckhart repeatedly indicated that she felt that she was underpaid. In this latter respect, Lasky indicates that he informed Eckhart that her rate was in conformity with area wage surveys prepared by neutral agencies. He denied asking her what she felt was a good "raise"[25] and denied ever having made a statement appealing that the Company be given a second chance and things will improve or to have suggested that if this were not the case, a petition could again be filed in 12 months. I credit the testimony of Eckhart and Ahner to the extent that it is mutually corroborative.[26] Thus, I find that

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25. According to Eckhart, Lasky inquired both as to what the Company could do to improve itself and what she thought would be a good raise. Ahner was the first to testify. Unlike Eckhart, her testimony fails to impute any statement to Lasky that could be construed as a "solicitation of grievances." In this respect I credit Lasky and reject the uncorroborated testimony of Eckhart. I would note in connection with this issue of credibility, that the brief filed by counsel for the General Counsel includes a representation that "Ahner corroborated Eckhart's testimony. . .". In this respect, the General Counsel's observation is at odds with my reading of the record. However, because of this misstatement, I was impelled needlessly to reread the entirety of Ahner's testimony 3 times to assure myself that my own reading was accurate and that the corroboration was not buried somewhat in her extensive testimony. I cannot imagine why any party would choose to make more difficult the task of ferreting out and assessing facts in a case involving so many allegations and diverse incidents by careless and misleading representations.

26. Lasky did not impress me as entirely trustworthy. His indication that he would not have made allegedly unlawful statements to either Ahner or Eckhart, because of their manifest union support, left me unimpressed. Any sensitivity to possible commission of unfair labor practice charges did not prevent his admitted participation in conversations concerning the Union with these individuals. Indeed, as a general proposition, I was not persuaded by Respondent's arguments founded upon alleged instructions issued to supervisors from attorneys, and from higher levels of management that they refrain from involvement with the organization

Lasky did appeal that they give the company a second chance, thereby implying that benefits would be forthcoming if the Union were defeated. Accordingly, in this respect, I find that Respondent violated Section 8(a)(1).

### 11. The Questionnaire

Lasky admitted that on March 31, he distributed a questionnaire among clerical unit employees. That document was of his personal design and its opening paragraph recited as follows:

> Listed below are a number of questions that will help the Management formulate Company policies. Answer the questions and deposit the questionnaire in the Question Box located by the badge rack. *Do not* sign your name. It is not mandatory that you complete the Questionnaire. What you say or don't say will not be used to reward or punish you. The questions are being asked *only* for the purpose of what is good or bad about the Company.

The questionnaire consisted of 9 multiple choose questions that probed the quality of employee relationships with supervision and other conditions of work and also afforded an opportunity for employee, if they chose, to make "any other comments".[27]

Lasky conceded that a week after said distribution, he met with those those who cooperated by completing the questionnaire, and on that occasion, reviewed the answers. He indicates that while he expressed the Company's position on the issues raised and the results, he refrained from making "any promises to the people".

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NOTES *(Continued)*

drive. Such directives, if made, admittedly went unheeded on a number of occasions. Accordingly, the mutually corroborative testimony of the General Counsel's witnesses in this respect is credited.

27. See General Counsel Exhibit 13.

Lasky went on to testify that on April 6, he distributed a second questionnaire and followed basically the same procedure with respect to employee responses in connection therewith.[28]

In testifying as to the origin of the questionnaires, Lasky admitted that he received no guidance from any procedure utilized by the Company in the past, but drew exclusively upon his experience and background as an industrial psychologist. There is no evidence that the Company had employed such a procedure in the past. Lasky admitted that the questionnaires were distributed solely to the clericals, and not to represented production and maintenance employees. Lasky denied that he informed either directly or indirectly, employees that the Company would take action to correct discrepancies between any position expressed by employees and company policy.

Consistent with the contention of the General Counsel, the conduct of Lasky with respect to the questionnaire entailed an unprecedented inquiry as to potential grievances held by the employees. It was timed to suggest that it constituted a precipitant reaction to union activity and was confined to those employees as to whom the Union had manifested an organizational interest. Although there is no evidence that specific promises were made, the implication to employees was clear enough. Thus, I agree with the observation by counsel for the General Counsel that as was true in *Gordonsville, Industries, Inc.*, 252 NLRB 563, 568, the survey conducted herein was a "specific, calculated response to the employee-union organizational campaign, (and) there can be little doubt that the purpose of this extraordinary and unprecedented action was to convey employees that the days of benign neglect were over." Thus, in the

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28. See General Counsel Exhibit 19.

circumstances presented here, employees would necessarily assume that Lasky's sudden concern for[29] their views had been awakened by union activity and that the stated purpose of the questionnaire to ascertain "what is good and what is bad about the company" involved "something more than a sterile fact finding venture." See *Arrow Molded Plastics, Inc.*, 243 NLRB 1211, 1215. In sum, the entire issue falls squarely within the framework of *Reliance Electric Company, Mattison Plant Mechanical Drivers Division*, 191 NLRB 44, 46 (1971), wherein the Board stated as follows:

> Where as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organization campaigns seeking to represent employees, we think there is a compelling inference that he is implicitedly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that

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29. Cf. *Jeffco Manufacturing Co., a Division of Ball Corporation*, 211 NLRB 787, where the Board dismissed an 8(a)(1) allegation founded upon the solicitation of grievances. There, however, management's action was merely an implementation of established employer policy memorialized in writing. Also inapposite are cases where employees themselves created the impetus for an airing of their complaints and those in which an employer expressly disavowed that it would rectify any grievances or revise its basic personnel policies as they impacted upon the employees. *Uarco Incorporated*, 216 NLRB No. 1 (1974) and *Tiffin, a Division of Hayes Albion Corporation*, 237 NLRB 20, 24-26 (1978). Consistent with the contention of the General Counsel, I agree that Respondent's statements which accompanied the questionnaires did not disavow an intention to favorably resolve grievances. The statement "no one will be rewarded or punished for participating or refusing to participate in this survey", as the General Counsel observes, relates solely to the question of employee participation, and does not reach the question as to what action the Company intended to take with respect to breakdowns in its policy reported by the participating employees.

the combined program of inquiry and correction will make union representation unnecessary.

Accordingly, I find that on March 31 and April 6, Respondent violated Section 8(a)(1) of the Act by utilizing the questionnaire and follow-on meetings with individual employees whereby their complaints were solicited under conditions affording a "compelling inference" that inequities would be resolved in the manner favorable to the employees upon dissipation of the restraints created by union activity.

**12. Publication of Work Rules**

By another somewhat belated amendment to the complaint, it was alleged that Respondent violated Section 8(a)(1) of the Act by on April 7, 1981, threatening to "more rigorously enforce and discipline its employees for violations of its Work Rules and Discipline schedule, in order to discourage its employees from supporting the Union." It is undisputed in this regard that on April 7, a copy of work rules was distributed by mail to all employees at the Slatington facility, including management, supervision, production and maintenance and clerical employees. Accompanying those rules was a letter over signature of Donald Fisher, which recited as follows:

> Enclosed are Keystone Plant Work Rules which are necessary for the orderly operation of the plant.
>
> Each employee is required to read, understand, and comply with the Plant Work Rules.
>
> Effective April 13, 1981, these rules will be rigorously enforced and disciplinary action will be taken if violations occur. This gives you one week to digest and understand the Work Rules.

The work rules as distributed were identical in context to those that had been published throughout the plant through bulletin board postings prior to the advent

of the Union.[30] Furthermore, John Lasky testified credibly that determination to distribute the work rules on the above basis had been arrived at well prior to the advent of union activity and was spawned by widespread cheating in connection with the incentive system covering production and maintenance employees. My belief of this testimony warrants the conclusion that Respondent has met its burden of showing that the conduct complained of here was merely an exercise of supervisory authority disassociated from organizational activity. Accordingly, the allegation that Respondent thereby violated Section 8(a)(1) of the Act shall be dismissed.

**13. The Evaluation System**

The complaint alleged that Respondent attempted to discourage union support in violation of Section 8(a)(3) and (1) of the Act by in June 1981, implementing a formal "evaluation system for its employees . . ." . In this respect it is noted that historically, Respondent's clerical employees were subject to annual evaluations. In June 1981, Respondent for the first time used a formal appraisal form in connection with employee evaluations conducted at that time. See General Counsel's Exhibits 11, 15 and 16. The forms rated employees on a qualitative basis in various employment areas, including attendance and punctuality. Opportunity was afforded to supervisors to make specific notations as to strengths and weaknesses with recommendations for improved performance. The new form in a completed state was offered for review by the employee at the time of the evaluation. In the past the supervisors took notes but failed to utilize any formal document in effecting the periodic reviews.[31]

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30. See *Budget Rent-A-Car System*, 237 NLRB 1294, 1303-1304, (1978).

31. An exception to this practice existed with respect to the evaluation afforded employees at the completion of their initial

As I understand the General Counsel's position in this regard, it is agreed that the 8(a)(1) and 8(a)(3) violations derive solely from the fact that this represented a change in working conditions implemented during the pre-election period. While this is so, I am not entirely certain whether introduction of the evaluation sheet would be viewed by employees as advantageous or detrimental, but I would surmise that opinions in that regard probably would vary among them. In any event, here again I am convinced that the Respondent has met its burden of disassociating the change from union activity. Based upon the credited testimony of Lasky, I find that the "performance appraisal form" was devised by Lasky in December 1980 on suggestion of Glover, and that it was at that time determined that it would be utilized upon review of the clerical employees scheduled for June of that year. As this determination was made well prior to the advent of the Union, I find that it in no fashion related to the organization campaign and simply reflected what the Employer would have done had the employees not engaged in union activity. See *The May Department Stores Company d/b/a Famous-Barr Company,* 174 NLRB 770, 771 (1969). Accordingly, the allegation that utilization of the new employee appraisal form violated Section 8(a)(3) and (1) of the Act shall be dismissed.

### C. The Layoffs

#### 1. Preliminary Statement

In June, during the critical pre-election period, Respondent laid off four employees, each of whom is alleged to have been terminated in violation of Section 8(a)(3) and (1) of the Act. The first took place on June 5 and involved Elaine Ahner. The complaint avers that

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probationary period. A written form was used historically in that connection.

Respondent "timed and implemented" said action in view of Ahner's support of the union. The remaining individuals named as discriminatees by this complaint are Betty Lou Phillips, Jeanette Eckhart and John Gellis, all of whom were terminated on June 26. Respondent, in the case of Gellis, as was true of Ahner, is alleged to have "timed and implemented" the layoff in retaliation for his union support. Unlike the others, Phillips was reinstated on August 20, and her layoff during the interim is alleged to have been inspired by union considerations. In the case of Eckhart, Respondent is alleged simply to have terminated her because of her union activity. Basically, Respondent defends on grounds that the terminations were economically oriented, disassociated from union activity, and specifically caused by elimination of their work through installation of a new computer system.

**2. The Foreground to the Economic Defense**

Prior to 1980, Respondent's computerized operations depended upon an outmoded system which functioned through dated computer language, was slower, and required labor intense, key punch operations. The inefficiency in the existing system was called to the attention of Walter Glover by Controller Smith, and the latter embarked upon a studied effort to upgrade the system during the first quarter of 1980. In April 1980, a decision was made to lease an IBM "System 34", a modernized computer with greater functional capacity. The lease was formally executed on April 16, 1980, and delivery was scheduled for September of that year. It was anticipated that Respondent's existing production control, order-entry, and payroll functions would be adapted to the new computer arrangement.

Preliminary to the computer going on line to service any of these three areas, extensive work was required to develop data base information which had to be processed

in a form enabling it to be fed into the new computer. Files had to be built incorporating this data, which then had to be key punched prior to entry on the new system through a terminal, with the visual aid of a CRT screen. To handle these efforts, Respondent in September and October 1980, utilized its own personnel as well as temporary employees hired from a manpower contractor.

On January 1, 1981, the new computer system went on line but solely with respect to the production control area. After production control went on line, the computer was made available for initial consideration of the adaptation of the accounting functions. Early in 1981, however, it was decided that the IBM MAPEC[32] software package would not accommodate that end of the business, and therefore Respondent elected to custom tailor a software package specifically for the order-entry-billing system. To do so, Respondent retained an outside contractor with expertise in the computer field. The latter on April 30, 1981, presented a report reflecting cost savings to be realized by placing the order entry-billing system on the System 34. In that document it was observed that the impact would result in definite elimination of one position in the shipping office and two in the tabulating department, at a total labor cost savings of $27,872.00 annually. On a tentative basis it was indicated that three other positions in the shipping office and one in the main office could be eliminated.[33] In May 1981, Respondent elected to go ahead with the contractor's recommended package. The target date for actual implementation of the reprogrammed order-entry system was set for the close of the annual plant shutdown in July. As of July 13, when plant operations resumed in

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32. The software provided by IBM for use with the System 34 of relevance here, is called Mapec. According to testimony of Gary Smith, this was a pseudonym for "manufacturing, accounting, production, inventory control system" or "something like that".

33. See Respondent's Exhibit 9.

full, the order-entry system joined production control as a completely on-line computerized system. Also noteworthy is evidence that prior to the advent of the Union office clerical employees generally were aware of the threat posed by the new computer system to their jobs.[34] Consistent with these fears, it is urged by the Respondent that the layoffs under scrutiny here were prompted exclusively by the elimination of positions dictated by implementation of the System 34, as distinguished from considerations proscribed by the Act.

### 3. The Individual Cases

#### a. *Elaine Ahner*

Ahner was initially employed in January 1979. On her employment application, it was signified that she was hired to perform cost-accounting on the "Fulton" line. Fulton was a marketing line at one time produced in a separate facility owned by the "Kiddie Group", a conglomerate of which Respondent is also a segment. That production facility was located in Burwick, Pennsylvania. In 1978, Burwick manufacturing operations were terminated. However, the Fulton line and marketing capability were retained. Production thereof was transferred to Respondent's Slatington plant. This arrangement lasted for 3 years until February 1981, when the Fulton line was finally terminated.

There is little basis for questioning Respondent's observation that in consequence of the elimination of the Fulton line, four positions were eliminated in February 1981. Since the Fulton line enjoyed its own independent marketing showroom, a vice-president in charge of that operation, as well as his assistant were terminated.[35] In

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34. See testimony of Betty Lou Phillips.

35. Karen Eaton, the assistant to the vice-president of Fulton, did not leave Respondent's employ until May 22, 1981. The Fulton vice president, Arnold Menis, was terminated on June 30, 1981.

addition the job of a "designer" at Slatington was eliminated, but the occupant thereof was retained to replace a Keystone designer who retired. Finally, the cost accounting position held by Elaine Ahner was eliminated. However, Ahner was not terminated. Instead, on March 30, she was reclassified as a key punch operator in the tabulating department.[36] In her new position, Ahner did key punch work in conjunction with the effort to build up data base files for input into the new computer system. She worked under the supervision of Ron Hinkle. She acknowledged that at the time of her transfer to key punch everyone in that department was insecure in that the key punch position eventually would be eliminated by the new system.

After the transfer according to Preston Thomas, he had a conversation with Ahner in April in which Ahner asked how long she would be employed by the Company. To this, Thomas responded that he could not make

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36. The March transfer of Ahner occurred within the 6-month period prescribed by Section 10(b) of the Act. However, this action was not challenged specifically by the complaint. Nonetheless, the General Counsel seems to argue that the transfer was founded upon illicit considerations. Firstly, I note that the matter was not fully litigated. In any event, the transfer occurred before Respondent is shown to have had knowledge of Ahner's union sentiment, and is found to have been triggered purely by economic considerations. I note in this regard that Ahner was not viewed as an entirely trustworthy witness. It was my impression that she deliberately understated the extent of her performance on the Fulton line prior to the March transfer, and that her expressions that thereafter her work remained in tact was no more than unreliable, self-serving argumentation. Instead I prefer the testimony of Preston Thomas, which to an extent is confirmed by that of Gary Smith, that as early as February, Ahner was informed that the decision had been made by management to eliminate the Fulton line and that anyone specifically hired to service the latter would have to be laid off. Thomas went on to testify credibly that because Ahner was recognized as a good worker, he on that occasion indicated that he wanted to give her an opportunity to find a job elsewhere before laying her off.

any promise as to specific length of employment, but that the possibility looked good that she would be employed through May, but that June and July would be questionable and she definitely would be laid off in August sometime. It is noteworthy that while Ahner was laid off before Elaine Meleski, a key punch operator, Data Processing Manager Hinkle on April 28 at the pre-election hearing testified both that Meleski was specifically informed that her employment would end on June 1 and that there was no chance that she would be retained on a permanent basis.

On May 11, Ahner was again transferred, this time from key punch to the main office under the supervision of Bernice Kern. Gary Smith explained the transfer as having been triggered by a medical leave of absence which was taken by an employee in the personnel department. The latter was replaced by a main office clerical, thus creating a temporary vacancy in the main office which was filled by Ahner. According to Smith, at the end of May, the individual who had gone on medical leave returned. Accordingly, on June 1, her replacement returned in the main office, thus, bumping Ahner.[37] Ahner was permitted to work the balance of that week but was laid off on Friday, June 5. According to Smith, following elimination of Ahner's cost accounting job in March, the Company needed spare hands, but as of June 5, there was nowhere else to assign Ahner.

The General Counsel contends that the above explanation for the layoff of Ahner was pretextual, and that in

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37. The testimony of Gary Smith in the above respect is not lacking in confirmation from Ahner. Thus, Ahner acknowledges that when transferred to Kern's office, she inquired of Gary Smith as to the reason for the transfer. Smith, according to Ahner, informed her that Zimlin was out sick, and that Cindy Babyak would replace the latter in personnel, going on to explain that it was necessary for Ahner to replace Babyak. Beyond this, Smith's testimony as to Zimlin's return and Babyak's restoration to her job in the main office was allowed to stand uncontradicted. It is credited.

reality Ahner was laid off because of her support of the Union and in order to prevent her from voting in the election. Consistent with the General Counsel's position, Ahner was a known advocate of the Steelworkers. She executed an authorization card, and attended union meetings. Her sympathy was overtly manifested by the fact that she wore union insignia three to four times a week commencing in April and continuing right through to the termination of her employment.[38]

**b. Betty Lou Phillips**

Phillips had been employed by Respondent since May 1962. Excepting a 5-year period commencing in 1963, she worked continuously for Respondent until her layoff on June 26, 1981. At the time, Phillips was a key punch operator in the tabulating department under the supervision of Ronald Hinkle.

Throughout the period prior to her layoff, Phillips had openly manifested union support by wearing a union button, a fact which drew the attention of Glover, Hinkle and Kern. Indeed, Gary Smith acknowledged that Phillips wore a union button just about everyday, that her union sympathy was well known to Respondent, and that among the clerical people she was referred to as "Norma Rae".

June 26 was the last workday prior to the 2-week July shutdown. Following said shutdown, the order entry-billing system was scheduled to go on line. However, with respect to payroll it does not appear that the system had been turned over for preliminary action to

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38. Although Anita Zinggeler and Jeanette Eckhart named Ahner as having attended the initial meeting with union representative Al Cavalla, Ahner's own testimony does not disclose that she was present on that occasion. On the contrary, she indicates that her first contact with the Union was when she received the blank authorization card in the mail. Ahner would be the most reliable source in this particular area.

place that process on the computer, a step then scheduled for September.[39]

As indicated, I have little doubt the order entry-billing system, when placed on line on July 13, was expected to render obsolete the functional element of Phillips' previous job. In support of the defense, Gary Smith claims, that upon consultation with Ron Hinkle, the latter recommended that Pat Rehrig, a former payroll clerk, who was skilled in segments of computer operation, be retained as the sole employee in data processing.[40] Hinkle recommended that Phillips be let go, commenting "she really did not make any effort to learn any other job in make any effort to learn any other job in the department."[41] In addition, Hinkle recommended that Elaine Meleski, a key punch operator, who was hired to work on a temporary basis be laid off.

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39. The facts bearing upon the staged out adaptation of the new System 34 to various accounting systems appears to suggest that there would be a need for a high volume of key punch work during the period after June 26, in connection with data accumulated via the July inventory and in ultimately placing the payroll system on line. It is also noted that the work previously performed by Phillips included responsibility for manual operations in connection with a segment of the order entry-billing system. As of June 26, even if the need for her skills and experience remained, it is clear that if all went as expected, functionally her position was destined for elimination after the July shutdown. On the other hand, underlying her separation was on assumption by management that the newly devised system would be functionally effective after going on line, or in other words, no emergency would arise that would require stop-gap manual performance of order-entry until the validity of the new program was proven through sustained operations.

40. Rehrig was skilled in the operation of computers and was capable of performing some programming. There was evidence that Rehrig was also among those who wore a union button. When, and for how long, she did so was not developed on the record. In any event, the special skills that Rehrig possessed would have insulated her from layoff no matter what the degree of her union activity.

41. There is no indication that Phillips was encouraged or afforded an opportunity in this regard.

Shortly before her termination, Phillips on June 11, was given a business as usual, annual evaluation by Hinkle. Her undenied testimony establishes that she at that time was informed that her work was good, that she did not make many errors or need assistance with her job, and that her record for absenteeism and lateness "was excellent".[42]

On June 26, Phillips was informed of her discharge by Gary Smith, in the presence of John Lasky. According to Smith she was told that "her particular job had been eliminated . . . we didn't have anymore work for her, and she was being laid off at the time." When Phillips charged that she was being laid off because of her union activity, that was denied by Smith who indicated "this is what the order entry system has done to the company and you're particularly (sic) function that you were doing has been eliminated."[43] Phillips was told at that time that her layoff was permanent.

However, as matters turned out the treatment ultimately extended in her case suggested that Respondent was not rigidly bound to the view that it had no place for those whose jobs were eliminated by the new computer system. Thus, about one month after the election on August 20, Phillips was recalled. According to Glover, he intervened and recommended her recall because of her considerable service with the Company and because a vacancy emerged by virtue of a resignation. Upon recall, she was not placed in the tabulating or data processing department, but was first assigned to the main office where she performed miscellaneous clerical functions, including proofreading, filing, and teletype for a 6-week period. At the end of that period, she was assigned to

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42. See General Counsel Exhibit 11.

43. The foregoing is based upon the credited testimony of Gary Smith.

production control and continued to work in that area as a computer terminal operator.[44]

**c. Jeanette Eckhart**

Jeanette Eckhart was hired in March 1978 as a timekeeper. At the time of her layoff, however, she was a payroll clerk.

Her reclassification to payroll clerk took place in 1980 when Pat Rehrig, the incumbent in that job was scheduled for maternity leave. Rehrig began training Eckhart in October 1980. Eckhart did not formally assume her new position until January 1, 1981.

Eckhart was among the clericals who made the initial contact with union representative Al Cavalla. She signed an authorization card, attended union meetings, and most significantly, wore the various union buttons including a relatively large pin of two and one-quarter inch diameter which in highly visible lettering dubbed her a "VOLUNTEER ORGANIZER".[45] Lasky and Smith acknowledged that they were mindful, at an early stage in the campaign, that Eckhart was a protagonist of the Union.

Respondent's defense is that the layoff of Eckhart ". . . was based solely on the impact of the new System 34 computer".[46] Two weeks earlier, Eckhart, on June 11, had received her annual evaluation.[47] Furthermore, neither the functions nor skills of the payroll clerk had

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44. The only evidence bearing upon her post-recall work history seemed at odds with testimony that Phillips was rehired to fill a vacancy. Nonetheless, it remains a possibility that Glover's testimony was accurate in this respect, and Respondent shall be given the benefit of doubt. However, the record fails to suggest that Phillips was any more competent to perform office functions or to operate a computer terminal after her layoff, than she was prior thereto.

45. See General Counsel Exhibit 8(a).

46. See Respondent's post-hearing brief, page 23.

47. See General Counsel Exhibit 16.

been outmoded or displaced by the production control, order entry-billing or any other system to be placed on line within reasonable proximity of her layoff. Nonetheless, as I understand Respondent's testimonial explanation for her layoff. Eckhart was "bumped" out her position as payroll clerk by her predecessor in that position, Pat Rehrig. According to the testimony of Gary Smith and Ron Hinkle, the latter recommended replacement of Eckhart with Rehrig, because Rehrig did not have enough to do, and was an experienced computer technician, who was familiar with the language used by the System 34 and had engaged in some programming on the new equipment. Accordingly it was recommended that Rehrig be retained as the "all around more capable individual". Nonetheless, Smith, who according to Respondent, "thought Eckhart should have the job", testified as to his deliberations concerning Hinkle's recommendation as follows:

Mr. Beracqua: Did you argue for Ms. Eckhart, or did you just agree with Mr. Hinkle's choice when he asked for that, between Rehrig and Eckhart?

Mr. Smith: I couldn't argue with Ron. I knew he was right. I felt very badly, because at the time that Pat Rehrig left for pregnancy leave I was under the impression she was not coming back. She was going to start a family and not come back to work. We had three timekeepers at the time, two timekeepers. One would fill in as a floater. The two timekeepers were Jennie Eckhart and Joanne Levandusky, and Anita Zinggeler filled in for them and knew the job.

Of the three I picked Jeannie as the

best one and the one that I thought would do the best job out of the three. It was a natural step up from a timekeeper up into a payroll clerk's position. And I chose Jeannie for that job. I recommended her for it, and all during this time she was having a rough time of it with Kern who was reviewing her work. When Pat Rehrig came back to work, she felt insecure about it. She didn's know where she stood at the time, and I reassured her that, Jeannie, this your job. You have it, we will find other work for Pat. And now it was time that I had to make some hard decisions based on recommendations by the managers to me.

But I knew that Ron was giving me the best recommendation. Pat was an all around more capable individual. I had a responsibility to the company to make that — to go with that recommendation. But I did feel like hell, because I was really backing Jeannie on this payroll clerk's job all the way. But I did decide to go with that recommendation.

On his own testimony, it is clear that Smith in allegedly accepting Hinkle's recommendation had gone back on his word to Eckhart. Furthermore, despite his expressed concern for Eckhart, he also elected not to reclassify Eckhart to her original position as timekeeper. His explanation for this appears below:

> No, there was no other positions (sic) available at the time. With Jeannie, she was a former timekeeper. The decision between Jeannie and Pat, it was just the right business decision to go with Pat. With Jeannie, I compared Jeannie with the timekeepers and thought about transferring her back into being a timekeeper, which means that one of the other timekeepers would have had to go. But at the time they were set in their positions.
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> They both had more time than Jeannie did in the jobs, and we still had the payroll application to transfer over to the new system. And at the time we believed that we would eliminate the timekeeping position with a new data collection system that was being installed for payroll purposes. So if I would have transferred her over to timekeeping, it would have been a matter of three or four months down the road and I would have had to lay her off later.[48]

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48. Smith's reasoning in this latter regard did not pan out. As of the date of the instant hearing, the original timekeepers remained in Respondent's employ. Also noteworthy is an inconsistency between Smith's testimony in this regard and the finding of the Regional Director in his Decision and Direction of Election, dated July 2, 1981, p. 3, based upon evidence developed a hearing on April 29 and 30, that the duties of "timekeepers" were to be modified but not eliminated. See General Counsel Exhibit 3. It is also noted that a temporary employee, Meleski, was recalled to perform key punch work on October 7. However, after key punch was eliminated, Meleski worked 4 hours a day entering payroll information on the CRT screen and making adjustments to payroll under the tutelage of Pat Rehrig. Eckhart was not offered recall when this opportunity arose.

From the foregoing, it is apparent that the action taken with respect to Eckhart involved a reversal of form. She had received assurances that she would be retained as payroll clerk even if Rehrig returned from maternity leave. It is also apparent from the evidence that in the position of payroll clerk, Eckhart survived a rocky beginning, including a personality conflict with Office Manager Kern. Later the quality of her performance as payroll clerk began to show progress. Indeed, Gary Smith himself testified that on the day of the layoff he mentioned to Eckhart ". . . that she was really starting to learn her job."

**d. John Gellis**

Gellis was hired in September 1978. At the time of his layoff, he was employed as a shipping clerk under the immediate supervision of Keith Cebrosky, who reported to Horace Brobst, the director of the shipping operation. The duties of Gellis included various clerical functions, including the matching of existing production to orders and assisting other clericals in typing bills of lading and manifests. He also maintained a filing system.

Gellis signed a union card and attended at least one union meeting. However, unlike the other alleged discriminatees, he did not wear a union button, or otherwise openly manifest union support. Furthermore, according to his own testimony, as early as May 1, he was aware that as a plant clerical, he had been declared ineligible to vote in the ensuing election.[49]

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49. I reject the representation by the General Counsel "at the time of his discharge, it was still unknown whether or not Gellis would be in the bargaining unit." I am aware of the finding made by the Regional Director after the discharge of Gellis in the Decision and Direction of Election. See General Counsel Exhibit 3, p. 3. Nonetheless, this finding is not necessarily inconsistent with the clear, unambiguous testimony of Gellis, which was left to stand unexplained on this record as follows:

As was true of Jeanette Eckhart and Betty Lou Phillips, Gellis received his regular employment appraisal on June 11, 1981. At that time, his strong points were listed in the area of cooperation, quality of work, and job knowledge. His weak points and criticism were limited to shyness, fear of making errors and reluctance in seeking assistance of supervision. The appraisal form of Gellis included notations concerning Gellis' complaints concerning his wage rates in relation to both Gayle Pope, another clerical, and an unnamed newly trained auditor.[50] Furthermore, in the course of the evaluation interview, Brobst stated that following the July shutdown, he would receive a raise.[51]

It is also noted that Gellis testified credibly and without contradiction that in mid-April, his immediate supervisor, Cebrosky, informed him that he had been instructed by Preston Thomas to tell Gellis ". . . that even

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Ms. Lopez-Henriquez: Were you eligible to vote in the election on July 20?

Mr. Gellis: No.

Ms. Lopez-Henriquez: Why not?

Mr. Gellis: Because at the hearings they had ruled that I was ineligible because I was plant clerical and not office clerical.

Judge Harmatz: Now, when was that determination made? Was that determination made pursuant to agreement of the parties at the R-case hearing?

Mr. Gellis: Yes.

Judge Marmatz: So that would be sometime in April, at the end of April — at least by May first, you already knew that you would be ineligible to vote in that election

Mr. Gellis: Yes.

The above segment of the transcript appears with corrections by the undersigned. The changes relate solely to nonsubstantive matters.

50. See General Counsel Exhibit 15.

51. The above is based upon the credited, uncontradicted testimony of Gellis.

after the computer did come in, that there would be 90 percent chance that I would still have a job." According to Respondent, "Gellis was laid off by the company because his key punching job in the shipping department had been eliminated by the System 34 computer."[52] I have no doubt that a significant and preponderant segment of the duties performed by Gellis were eliminated under the new system. In addition, I also believe that it absorbed other duties previously performed on a manual basis by other clericals in the shipping department.

As for the selection of Gellis, it appears that three clericals were assigned to his department; namely, Gellis, Linda Schuler and Gayle Pope. Brobst testified that in early or mid-June, Smith informed Brobst that a cutback was necessary in his department. Brobst, who had anticipated that a substantial amount of work would be eliminated by the computer, claims to have previously decided to layoff Gellis, for reasons set forth below:

Mr. Beracqua: Who did you decide on?

Mr. Brobst: I had decided on Mr. Gellis.

Mr. Beracqua: And can you tell us why?

Mr.Brobst: Yes. There are three people working in the shipping office: Linda Schuler, John Gellis and Gayle Pope. Because of the way we are structured there with our supervision, if someone is missing or if someone is out for any reason you have to have someone to take over the duties, certain responsibilities there to deal with the people.

Gayle Pope was the person who we had used in that respect several

52. See Respondent's brief. p. 26.

times, and she did a very good job. I felt that Gayle was potentially management material, and she had proven that by being aggressive in the past. Whereas on the other hand, Mr. Gellis was very shy and timid and just, in my opinion, could not work with the people on the floor. That was my opinion.

Mr. Beracqua: You said that Ms. Pope filled in or substituted for a supervisor. Can you explain that?

Mr. Brobst: Yes. You have to understand the different job titles there. Gellis was primarily clerical. Gayle Pope worked with the card file and inventory system whereby she would deal with the people on the floor constantly working with the lift operators, not being their immediate supervisor,

but she had to deal and work with them. They respected her and worked with her.

At times when someone was missing, she would serve as the dock supervisor when someone was missing.

Mr. Beracqua: How old is Ms. Pope?

Mr. Brobst: I'm not exactly sure. I think she is around the mid 30's or somewhere in there. I'm not really sure. I would judge her to be that.

Mr. Beracqua: The recommendation, then, that you gave Mr. Smith in early to mid-June, or if you recall it, was who?

Mr. Brobst: I told him that I wanted to retain Gayle Pope for the reasons that I just gave, and that if anybody had to leave it had to be Gellis, No. 1.

* * *

Judge Harmatz: How about Schuler?

Mr. Brobst: Linda Schuler was a long time employee who filled in for the man who does all the routing of the orders, who was also a salaried employee. When he was out on vacation or reserve duty which he had twice a year, she would fill in for him. . . .

**4. Concluding Analysis Regarding Alleged Discrimination**

As heretofore indicated, there is no reason to question the fact that computerization of production control and the anticipated adaptation of the order entry-billing to the System 34 forbode an elimination of jobs. Nonetheless, this fact does not end the inquiry. For the allegations of discrimination herein require assessment of whether Respondent would have elected to avoid layoffs, and to defeat cost savings by reducing the workforce over a period of time on the basis of attrition, had the alleged discrimnatees not engaged in organizational activity.

In this respect it is noted that Respondent's economic defense is interposed in the context of a strong *prima facie* case to the effect that office clericals Ahner, Eckhart and Phillips were singled out for discrimination. The elements of timing, knowledge and animus combine in their cases persuasively to suggest that their

layoffs were interwoven into an overall campaign of intimidation designed to assure a defeat of the Union at the polls. Thus, the appropriate unit consisted of 22 employees. By virtue of the layoffs, the voting group was substantially reduced under circumstances unambiguously prejudicial to the organizational effort. For Ahner, Eckhart and Phillips were known union activists, who on a continuous basis openly manifested their union support. There was no doubt of their sentiment from beginning to end. The continuity with which they wore union buttons amounted to conduct which drew attention, if not the wrath, of management representatives on several occasions.

Respondent's union animus is evident on a broadened scale through other conduct as well. Most telling to the instant analysis was the reaction to the Union by Respondent's highest ranking official at the Slatington plant, Walter Glover. Thus it took only a few days for Glover to respond personally to the Union's initial thrust. His several meetings with employees included sessions as early as March 25 and 30, during which he personally delivered hard hitting, though legitimate, antiunion speeches stressing the precarious competitive posture of the Company. Glover argued against union representation by exalting present benefits enjoyed by the clericals, while warning that the Union could call strikes but not prevent layoffs. He even went so far as to voice the opinion that employees who sign union authorization cards "signed away their rights."

Beyond that, however, Glover's zeal to influence employees carried his discourse into an area which seriously beclouds the defense. Thus, at the antiunion meeting of March 26, Glover discussed the effects of computerization, an issue which furnished substantially, if not entirely, the initial impetus for unionization. The commitment personally expressed by Glover at that time is difficult to reconcile with the layoffs of the three office clericals. In this regard, Glover stated as follows:

Now, another point I want to bring up. Seniority, job security, the computer, I made references to this the other day. We are a company (sic) with a heart. Now, we have reached a point in production control where we no longer needed Wilma. She could go. We no longer needed a Bobby Scott, he could have gone. So I said no. These people have tenure with this Company, they have time with the Company. We find a place for them. We put them into other jobs. We'll find, we'll train, we'll retool for these people to find a place for them. Reathie, I'm very concerned about you, you've got 25 years with the Company and you know here you see your job may be possibly disappearing, but I don't want you to have insecurity. I'm gonna, you're not gonna be hurt, I'm gonna find some damn place for you. But don't take that power away from me.

This view was carried forth by Ron Hinkle, at least with respect to key punch, when at the pre-election hearing held on April 29 and 30, he testified as follows:

Q. And you said that Reathie Ahner was a key punch operator, you have Rehrig as a key punch operator, and Elaine Ahner?

A. Right.

Q. Okay, that's the three?

A. And, Elaine Meleski – well, she's a part-time. Yes, you're right.

Q. Now, those are three full-time permanent key punch operators: correct?

A. Yes.

Q. You said that when you have the new system functioning, key punching is eliminated?

A. That's right.

Q. What's going to happen to those three people?

A. We are going to try to find other positions for these people, as far as I understand.

Q. Is it the current plan to retain them in the data

A. No.

Q. No. So, they will no longer be in the data-processing department?

A. No.

Q. But the company will attempt to find them other positions?

A. Yes.

Q. And you don't know where?

A. No.

Q. Who does know that, do you know?

A. No, I don't know.

Q. No final plans have been made, yet?

A. No.

Consistent with the foregoing there is no evidence that at any time prior to June 5,[53] a single office clerical at Slatington was terminated because his or her job had been eliminated.[54] In contrast with treatment accorded Ahner, Eckhart and Phillips, as stated by Glover on

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53. I am not unmindful of testimony to the effect that Ahner had been told in April that there was a possibility that she would be laid off in June or July but definitely in August. Although the matter is not free from doubt, on balance, it is concluded that the clear assurances afforded by Respondent's President, Glover, ought be given primacy over the speculation by his "lieutenants."

54. The termination of Gellis presents a distinct issue. He, like Quality Inspector Glen Shoff, was not within the clerical unit and it does not appear that the policy expressed by Glover on March 26 concerning job security applied to those outside the voting group. Furthermore, it is my conclusion that the overt support of the Union manifested by Ahner, Eckhart and Phillips constituted a continuing thorn to Respondent, and unlike Gellis, who did not wear Union insignia, who did not otherwise openly proclaim his sentiment, and who was known to be ineligible to vote in the election, Respondent was plainly on notice that the three office clericals were unwavering votes for union representation. In short, though Gellis might have been a suspected union adherent, his case lacks the attributes of discrimination deemed controlling with respect to the office clericals. I shall dismiss the 8(a)(3) and (1) allegations based upon the layoff of Gellis.

March 26, layoffs had been avoided when the System 34 was placed on line to handle the production control function in January 1981. In this regard, Glover named 2 employees who no longer were "needed" at that time, going on to state that a place was found for them and they were put in other jobs. Glover underscored the lengths to which the Company would go to avoid layoffs by stating: "We'll find, we'll train, we'll retool for these people to find a place for them." Going on to describe the Company as possessed of "a heart" and one which would treat employees fairly, Glover's assurances were in no sense *conditioned* upon the *availability of work*. The only limitation was his plea that the employees not take this "power away".

The defense offers no explanation reasonably tending to reconcile its position in June that continued employment would depend upon work availability, on the one hand, and Glover's message to employees in March that the System 34's threat to office clericals would be absorbed without impairing their job security. Why this reversal, and just who made the decision to do so is a matter left open by the Respondent's evidence. On the other hand the assurance against layoff and Glover's plea that employees not remove his authority to make good thereon were registered prior to the appearance of union buttons. Later, however, Ahner, Eckhart and Phillips defiantly and on a regular basis used such insignia to openly manifest their pro-union sentiment until the date of their terminations. Their conduct in that regard was a direct betrayal of Glover's March 26 appeal[55] that they not "take that power away . . .". Indeed, said terminations were not inconsistent with the

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55. The depth of Glover's animus toward such activity is evident through his admitted inability to tolerate the wearing of pro-union insignia within the confines of his office.

proclivity suggested by Glover's remark to Darlene DeLong on the day of the election to the effect that union supporters ". . . had hurt him for the last time."

In the light of his prior comments concerning job security and personally conveyed union animus, it is not surprising that Glover's testimony sought to mitigate his role in connection with the June layoffs. Thus, Glover denied that he was present in the plant during the months of June and July.[56] And while further denying that he participated in the decision as to who would be laid off, he claims to have been informed in this respect as "the decisions were made. . . ." By implication, Respondent thereby was in a position to place responsibility for the reversal of Glover's announced policy in other unidentified management representatives. However, I believe Glover's involvement was far greater. As the highest ranking management official at Slatington, and having laid his own record for fairness on the line[57] in professing concern to employees for their job security, I am convinced that, contrary to his testimony, Glover, if not the architect, was directly involved in deliberations both to effect the June layoffs, and as to who would be included therein.

The spector of discrimination also appears in Respondent's action with respect to post-layoff vacancies. Although Phillips was reinstated after the unfair labor practice charges were filed, Elaine Ahner and Jeanette Eckhart were passed over during this period. Instead, in October, Respondent recalled Elaine Meleski to perform key punch work. The latter had less service with the Company than Ahner, who as will be recalled had also been trained in key punch operations. Furthermore,

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56. It is clear, however, that he was present on July 20, the day of the election, at least long enough to coercively interrogate Darlene DeLong.

57. In his March 30th speech adverted to his "track record" reflecting that he had ". . . run a pretty damn fair company."

Meleski, who had also been laid off on June 26, previously was considered merely as a temporary, part-time employee. After her recall, however, Meleski was removed from key punch, and without affording Eckhart recall, she was trained to enter payroll data on a CRT screen under scrutiny of Pat Rehrig. In a similar vein, Respondent hired Bonnie Hewitt on October 5 to perform general office duties, for which Ahner and Eckhart could qualify. Hewitt had not worked for Respondent for 4 or 5 years. According to Gary Smith, Hewitt was hired on a recommendation of Barbara Meinhart, a supervisor. Smith claims that he accepted said recommendation because Meinhart knew what had to be done in the main office and felt that Hewitt could do the job. Smith's testimony was unsubstantiated and suspect. There is no indication that the job for which Hewitt was employed involved unique capabilities or expertise. The preference afforded Hewitt at the expense of Eckhart and Ahner not only reflects adversely upon Respondent's basic decision to effect the layoffs but also is deemed to be an extension of the unlawful discrimination against them.

Also tending to support the view that the continuing union activity on the part of Ahner, Eckhart and Phillips furnished the supervening cause for Respondent's change in attitude towards job security, is evidence suggesting that the System 34 remained in a transitional state as of June 26. Thus the possibility is suggested that the layoff might well have been premature, when considered in the light of Respondent's assigned justification. In this connection, it is noted that consistent with Glover's March 26 assurance, Elaine Ahner was not terminated when her job was eliminated but on March 30 was simply assigned for training in a different classification. Smith explained this action as due to the fact that "we were in the middle of the transferring from one type of computer setup into a new computer system . . . we had a lot of things in the state of flux, and we needed personnel from time-to-time to do . . . the ordinary type

work that was necessary to help in the transition." However, Respondent's own evidence suggests that the transition, as of June 26, had not concluded and indeed, that at least with respect to the payroll area "things" remained in a state of "flux". At that time, the order entry-billing system was two weeks away from actual operation, and was yet to be tested on a functional basis as an on line system. In addition, payroll was not scheduled to go on line until September 1981. Indeed, it does not appear that the computer had been released for preliminary payroll applications as of June 26. Furthermore, Smith described the payroll application as "involved" because the data collection system required information to be collected directly from the production floor. In this regard, Reathie Ahner initially performed the key punch in connection with payroll, but later was transferred to a different area, whereupon Meleski was recalled in October as her replacement. At this point, payroll data remained to be key punched, and after this work was exhausted, Meleski continued to enter payroll information on a CRT screen and terminal. The totality of the circumstances, suggest that the transitional period, and the work generated by the transition between systems was in an indefinable, unpredictable state at the time of the June layoffs.

For the above reasons, parol testimony to the effect that, at the time of their layoffs, no work was available to which Ahner, Eckhart and Phillips could be assigned was not believed. In any event, even were I to accept such evidence, the management policy declared by Glover on March 26 to the effect that layoffs would be avoided was not conditioned on the availability of work. On the totality of the credible proof, I remain convinced that Glover abandoned this stance in the case of Ahner, Eckhart and Phillips out of frustration with their continuing overt manifestation of Union support. It is concluded that the System 34 afforded a convenient pretext for confirming the point made earlier on March

30 by Glover himself that "no union can prevent a layoff" and as an object lesson re-emphasizing his warning of March 26 that employees not take "away" his "power" to be "fair". Accordingly, it is found on balance that Respondent has failed by credible proof to demonstrate that Ahner, Eckhart and Phillips would have been laid off "in the absence of protected conduct." *Wright Line, a Division of Wright Lines, Inc.*, 251 NLRB 1083, 189. Hence, I find that Respondent violated Section 8(a)(3) and (1) of the Act by laying off Ahner on June 5 and by taking similar action with respect to Eckhart and Phillips on June 26.

## IV. Case No. 4-RC-14652

As is accurately stated in the Acting Regional Director's "Supplemental Decision on Objections to Election", the objections to Employer conduct interfering with free choice in the July 20 election are co-extensive with certain alleged unfair labor practices set forth in the instant complaint. Furthermore, by virtue of findings heretofore made, the subject matter of Objections 4, 5 and 6 (discrimination) and Objection 13 (interrogation) have been substantiated as unfair labor practices within the meaning of Section 8(a)(1) and/or 8(a)(3) of the Act. Accordingly, said objections are sustained and based thereon it shall be recommended that the election be set aside.[58]

## V. The Remedy

### A. The Alleged 8(a)(5) Violation

#### 1. Preliminary Statement

The General Counsel in the face of the Union's failure to receive majority designation in the course of

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58. As I have concluded that the evidence does not substantiate the unlawful conduct specified in Objections 1, 2 and 3. These objections are hereby overruled.

the election conducted on July 20, urges nonetheless that Respondent be found to have violated Section 8(a)(5) and (1) of the Act on the strength of authorization cards executed by a majority of the employees. In this regard, the General Counsel seeks to bring this case within *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575 (1969) where the Supreme Court authorized the issuance of a bargaining order if necessary to remedy collateral unfair labor practices in cases falling within either of the following classifications:

> 1. Where an employer's unfair labor practices are "outrageous", "pervasive", and "of such a nature that their effects cannot be eliminated by the application of traditional remedies with the result that a fair and reliable election cannot be held", or
>
> 2. Where an employer's unfair labor practices are "less pervasive", but have the "tendency to undermine the majority strength of the Union and impede election processes", ". . . if . . . the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards, would, on balance be better protected by a bargaining order. . . ."[59]

**2. The Appropriate Unit**

The complaint alleges that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All office clerical employees employed by the employer at its Slatington, Pennsylvania facility, including key punch operators, order entry clerks,

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59. 395 U.S. at pp. 614-615.

computer operator, payroll clerk and time record-keepers, and excluding production and maintenance employees, shipping clerks, production control employees, time study technicians, managers, guards and supervisors as defined in the Act.

In its duly filed answer, Respondent denied this allegation. Said denial, however, was unsupported by any evidentiary presentation. On the other hand, the above described unit was found to be appropriate after a hearing in the Decision and Direction of Election issued by the Regional Director on July 2, 1981. The election conducted on July 20, 1981, was held in said unit, and it does not appear that the Employer sought review of the Regional Director's unit determination. Accordingly, under established Board policy, the Regional Director's finding is entitled to conclusive weight in this proceeding. See Section 102.67(f) of the National Relations Board Rules and Regulations. See also *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941). On this basis, it is concluded that the unit set forth above constitutes the appropriate collective bargaining unit herein.

### 3. The Request for Recognition

By letter dated April 6, 1981, the Union, over signature of Nicholas Sava requested recognition as the exclusive bargaining representative of a unit of office clerical and technical employees. Although the unit defined therein was not co-extensive with that ultimately deemed appropriate, the demand for bargaining was legally effective. *Pilot Freight Carriers, Inc.*, 223 NLRB 268, 304.

### 4. The Union's Majority

As of April 6, the appropriate collective bargaining unit set forth above consisted of 22 employees. Credible testimony on this record shows that as of that date the

Union possessed authorization cards which validly manifested a clear, unambiguous designation of the Union on the part of at least 13 employees.[60]

Accordingly, I find that as of April 6, the Union had been designated by a majority of Respondent's employees in the appropriate unit.

### 5. The Refusal to Bargain

The findings heretofore made attest to the fact that Respondent during the critical pre-election period engaged in serious unfair labor practices including coercive interrogation, instructing employees to remove union insignia, requesting that employees refrain from attending union meetings and threatening unspecified reprisals if they chose to do so, threatening that Respondent might go out of business if the Union were designated, stating that an employee might be terminated because of her union support, implying that benefits would be forthcoming if the union were defeated, soliciting employee grievances under conditions implying that management would take favorable action upon them, and terminating, for discriminatory reasons, three known supporters of the Union. These unfair labor practices not only depleted the ranks from which the Union surely would be expected to draw support, but signaled to all employees in the appropriate unit the lengths to which Respondent would go to thwart organization. Moreover, the Respondent's unlawful use of

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60. This group included William Balliet, Barbara Jean Skrapits, Pat Rehrig, Jacqueline Ruch, Deanna Gombert, Dom DeFuso, Anita Zinggeler, Joanne Levandusky, Melissa Horvath, Pat Eckhart, Betty Lou Phillips, Elaine Ahner and Jeanette Eckhart. As there is no basis for challenging the effectiveness of these designations, and as they represent a clear majority of employees in the appropriate unit as of April 6, it is unnecessary and I do not pass upon the cards of Reathie Ahner, Cynthia Babyak and Mary Rodenbach.

questionnaires conveyed to every member of the collective bargaining unit the implied message that management policy would be reshaped to conform to their criticisms upon the Union's demise, and amounted to an unfair labor practice which would continue to stir the imagination of employees even after application of conventional Board remedies. In sum, this combination of unlawful intimidation, discrimination, and industrial bribery, sufficed to neutralize the effectiveness of conventional Board remedies to create an atmosphere in which it could be considered likely that a fair election could be held in the future. Accordingly, it is found that Respondent by refusing to recognize the Union as the exclusive representative of employees in the appropriate unit on and after April 6, 1981, violated Section 8(a)(5) and (1) of the Act.

The complaint further alleged that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the evaluation system without notifying and first consulting and negotiating with the Union. This allegation relates to the appraisal forms that have been previously discussed in connection with an 8(a)(1) allegation. As the appraisal forms would affect conditions of work and hence constitute a mandatory subject of collective bargaining, Respondent, further violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the new appraisal form, without first negotiating and bargaining with the Union. A like allegation with respect to the distribution of Respondent's work rules is dismissed on the ground that the evidence failed to disclose that Respondent thereby effected any change in pre-existing conditions of work.

### B. *General Remedial Recommendations*

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that Respondent cease and desist therefrom and take

certain affirmative action deemed necessary to effectuate the policies of the Act. Respondent's overall unlawful campaign included a comprehensive pattern of intimidation which not only threatened the existence of employee rights, but reflected a proclivity to violate the Act to a degree warranting a broad cease and desist order. Accordingly, it shall be recommended that Respondent be ordered to cease and desist from "in any other manner" interfering with, coercing, or restraining employees in the exercise of their Section 7 rights. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Having concluded that Respondent unlawfully and for discriminatory reasons laid off and failed to reinstate Elaine Ahner and Jeanette Eckhart, it shall be recommended that Respondent offer each of these employees immediate reinstatement to her former position, or if not available, to a substantially equivalent position and make each whole for any loss of earnings she may have suffered by reason of the discrimination against her by payment of a sum of money equal to the amount they normally would have earned from the date of discharge to the date of a bona fide offer of reinstatement, less net interim earnings during that period.

It having been found that Respondent discriminatorily laid off Betty Lou Phillips on June 26, 1981, it shall be recommended that Respondent make her whole for earnings lost from June 26 to her reinstatement on August 20, 1981, less net interim earnings.

All backpay due shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and shall include interest as specified in *Florida Steel Corporation*, 231 NLRB 651 (1977).[61]

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61. See generally, *Isis Plumbing & Heating, Co.*, 138 NLRB 716 (1962).

## VI. Conclusions of Law

1. The Respondent-Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Petitioner-Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent independently violated Section 8(a)(1) by coercively interrogating employees concerning union activity, by requesting that employees not attend union meetings, by threatening them with unspecified reprisals if they attend union meetings, by instructing an employee to remove union insignia, by soliciting employee grievances under conditions implying that they will redressed if the union were rejected, by implying that benefits would be forthcoming if the Union were rejected, by informing an employee that another had been terminated and that she too would get the axe because of her union activity, and by threatening to go out of business if the Union were designated.

4. Respondent violated Section 8(a)(3) and (1) of the Act by on June 5, 1981, terminating Elaine Ahner, and by on June 26, 1981, terminating Betty Lou Phillips and Jeanette Eckhart, to discourage union activity.

5. All office clerical employees employed by the employer at its Slatington, Pennsylvania facility, including key punch operators, order entry clerks, computer operator, payroll clerk and time recordkeepers, and excluding production and maintenance employees, shipping clerks, production control employees, time study technicians, managers, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. The Union since April 6, 1981, is, and has at all times material herein, the designated representative of the majority of the employees in the unit described

above and is the exclusive bargaining representative of said employees within the meaning of Section 9(a) of the Act.

7. Respondent, since April 6, 1981, has refused to bargain in good faith with the Union as the exclusive representative of employees in the unit described in paragraph 5 above with respect to their rates of pay, wages, hours of employment and other terms and conditions of employment.

8. The Respondent, violated Section 8(a)(5) and (1) of the Act, by on or about June 11, 1981, implementing a formal evaluation system for appraising job performance of its employees without first notifying and bargaining in good faith with the Union as exclusive representative of employees in the aforedescribed appropriate unit.

9. The unfair labor practices found above have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [62]

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62. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

## ORDER

Respondent Keystone Lamp Manufacturing Corporation, Slatington, Pennsylvania, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning union activity.

(b) Requesting that employees not attend union meetings, and instructing them to remove union insignia.

(c) Threatening employees with reprisals if they attend union meetings.

(d) Telling an employee that union activity led to another employee's discharge and could lead to termination.

(e) Soliciting grievances of employees under conditions implying that they would be redressed in the event that the Union is defeated, and otherwise promising benefits to discourage employees from supporting the Union.

(f) Threatening to go out of business of the Union were designated.

(g) Discouraging membership in a labor organization, by laying off, refusing to reinstate, or in any other manner discriminating against employees with respect to their wages, hours, or tenure of employment.

(h) Refusing to bargain in good faith by declining to recognize the Union as majority representative of employees in the appropriate collective bargaining unit as their exclusive representative and by unilaterally changing a

condition of work without notification or prior consultation and bargaining with said Union.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following action designed to effectuate the purposes of the Act:

(a) Offer Elaine Ahner and Jeanette Eckhart, reinstatement to their former position, or if not available to a substantially equivalent position without loss of seniority or other benefits, and make them, together with Betty Lou Phillips, whole for any earnings lost by reason of the discrimination against them in the manner defined in the section of this Decision entitled "The Remedy".

(b) Preserve, and upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(c) Upon request, bargain with the Union as the exclusive representative of employees in the unit defined below, respecting rates of pay, wages, hours and other terms and conditions of employment and if an understanding is reached, embody it in a signed, written agreement. The appropriate unit within the meaning of Section 9(a) of the Act consist of the following:

All office clerical employees employed by the employer at its Slatington, Pennsylvania facility,

including key punch operators, order entry clerks, computer operator, payroll clerk and time recordkeepers, and excluding production and maintenance employees, shipping clerks, production control employees, time study technicians, managers, guards and supervisors as defined in the Act.

(d) Post at its facility in Slatington, Pennsylvania, copies of the notice attached hereto and marked "Appendix".[63] Copies thereof, on forms provided by the Regional Director for Region 4, shall be signed by Respondent's authorized representative and posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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63. In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the election conducted on July 20, 1981, in Case 4-RC-14652 be, and hereby is, set aside.

Dated, Washington, D.C. December 30, 1982

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Joel A. Harmatz
Administrative Law Judge

APPENDIX

JD-559-82

# NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES WERE REPRESENTED BY THEIR ATTORNEYS AND AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR RESPECTIVE POSITIONS, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND TO CARRY OUT ITS TERMS.

The National Labor Relations Act, gives you, as employees, certain rights, including the right:

To engage in self-organization;
To form, join, or help a union;
To bargain collectively through a representative of your own choosing;
To act together for collective bargaining or other mutual aid or protection; and
To refrain from any or all of these things.

Accordingly, we give you these assurances.
WE WILL NOT coercively interrogate employees concerning union activity.
WE WILL NOT request that employees not attend union meetings, or instruct them to remove union pins.
WE WILL NOT threaten employees with reprisals if they attend union meetings.
WE WILL NOT tell an employee that union activity

could lead to termination.
WE WILL NOT tell employees that benefits will be improved if the Union is defeated.
WE WILL NOT solicit grievances of employees under conditions implying that they will be redressed in the event that the Union is defeated.
WE WILL NOT discourage you from forming, joining, assisting, or in any respect engaging in activity on behalf of UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, or any other labor organization, by laying off, discharging, or in any other manner discriminating with respect to your conditions of work or job tenure.
WE WILL NOT refuse to bargain in good faith with UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, by refusing to recognize as exclusive representative of the employees in the appropriate unit set forth below for purposes of bargaining with respect to wages, hours and terms and conditions of employment. The appropriate bargaining unit is:

> All office clerical employees employed by the employer at its Slatington, Pennsylvania facility, including key punch operators, order entry clerk, computer operator, payroll clerk, and time recordkeepers, and excluding production and maintenance employees, shipping clerks, production control employees, time study technicians, managers, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith with UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, by unilateraly changing wages, hours or terms and conditions of employment without first notifying, consulting, and bargaining with respect thereto.
WE WILL grant immediate reinstatement to ELAINE AHNER and JEANETTE ECKHART, and we shall make them, together with BETTY LOU PHILLIPS, whole for earnings lost by reason of our discrimination against them, with interest as set forth in the Decision of

the Administrative Law Judge.

KEYSTONE LAMP MANUFACTURING CORPORATION

_____

(Employer)

Dated _____ By_____

(Representative) (Title)

_____

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

**This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. 1 Independence Mall – 7th Floor, 615 Chestnut Street, Philadelphia, PA 19106 – (Telephone No. (215) 597-7643.)**

Supreme Court, U.S.
FILED
DEC 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-760

# In the Supreme Court of the United States

OCTOBER TERM, 1988

KEYSTONE LAMP MANUFACTURING COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly enforced the bargaining order issued by the National Labor Relations Board.

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A9) is unreported. The decision and order of the National Labor Relations Board (the Board) (Pet. App. A12-A26), including the decision of the administrative law judge (Pet. App. A27-A103), is reported at 284 N.L.R.B. No. 74.

### JURISDICTION

The judgment of the court of appeals was entered on May 2, 1988. A petition for rehearing was denied on July 6, 1988 (Pet. App. A4-A5). On September 20, 1988, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 4, 1988 (Pet. App. A2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner manufactures portable lamps at a facility located in Slatington, Pennsylvania. In March 1981, Anita Zinggeler, Jeanette Eckhart, and Darlene DeLong, clerical employees at petitioner's plant, discussed with a representative of the United Steelworkers of America (the Union) the possibility of organizing petitioner's 22 office clerical employees. The Union mailed out blank authorization cards on March 19, and by March 25, some 15 employees had signed and returned their designations to the Union. Pet. App. A32-A33 & nn. 2-3.

Shortly after the March 19 mailing, petitioner embarked on "an antiunion campaign designed to discourage its employees from supporting the Union" (Pet. App. A21). As the Board explained (*ibid.*):

> In the first 3 weeks of the union organizing campaign, [petitioner] threatened to go out of business if the Union won the election, threatened employees with reprisals if they attended union meetings, asked employees to stay away from union meetings, coercively interrogated two employees, ordered an employee to remove her union button whenever she entered [petitioner's] President's * * * office on business, and distributed two questionnaires to all unit employees soliciting their grievances under conditions implying that these grievances would be redressed if the Union lost the election.

On April 6, the Union notified petitioner that it had received signed authorization cards from a majority of the office clerical employees and requested recognition. By that date, 13 employees, a clear majority of the 22 member unit, had designated the Union as their representative. Pet. App. A33 & n.3, A91-A92 & n.60. At the same time, the Union filed a petition for a Board-conducted repre-

sentation election, and an election was scheduled for July 20 (*id.* at A33).

In the three months prior to the election, however, petitioner promised employees that benefits would be improved if the Union lost the election, created the impression that employees' union activities were under surveillance, and laid off three employees who were known to be Union supporters (Pet. App. A21-A22). The Union thereafter lost the July 20 election; of the 22 eligible voters, seven ballots were cast for representation, and 12 were cast against (*id.* at A31). The Union filed objections to the conduct of the election, as well as unfair labor practice charges under Section 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3) and (5). A complaint issued on August 31, 1981. Pet. App. A30-A31.

2. On December 30, 1982, after a hearing on the complaint, the administrative law judge (ALJ) determined that petitioner had engaged in extensive unfair labor practices (Pet. App. A30-A103). The ALJ found that petitioner had violated Section 8(a)(1) of the Act, by threatening to go out of business and to seek reprisals if the employees engaged in union activity, and by promising benefits to the employees if they refrained from union organizing (Pet. App. A95). The ALJ also found that petitioner had violated Section 8(a)(3) and (1) by laying off three of its employees, Elaine Ahner, Jeanette Eckhart, and Betty Lou Phillips, in order to discourage union activity (*ibid.*).

As a remedy, the ALJ recommended that petitioner be ordered to reinstate Ahner and Eckhart, and to make whole both them and Phillips (who had by then been recalled) for any loss resulting from their discriminatory layoffs. In addition, the ALJ determined that a broad cease and desist order should be issued, in light of petitioner's "overall unlawful campaign [which] included a comprehensive pattern of intimidation [and] which not only

threatened the existence of employee rights, but reflected a proclivity to violate the Act * * *." Pet. App. A94. Finally, the ALJ found that as of April 6, 1981, the Union had been designated as the representative of a majority of the employees in the bargaining unit, and that petitioner's "combination of unlawful intimidation, discrimination, and industrial bribery, sufficed to neutralize the effectiveness of conventional Board remedies to create an atmosphere in which it could be considered likely that a fair election could be held in the future" (Pet. App. A91-A93). The ALJ accordingly recommended that petitioner be required to bargain with the Union on request (*id.* at A98).[1]

3. Except in minor respects, the Board adopted the ALJ's findings and concluded that petitioner had violated Section 8(a)(1), (3), and (5) of the Act (Pet. App. A12-A23). It agreed with the ALJ that petitioner had exhibited animus toward its employees' union activities; that Ahner, Eckhart, and Phillips had been "selected * * * for layoff because of their union activities"; and that petitioner's defense of its actions was a "convenient pretext for the[ ] layoffs" (*id.* at A19). The Board also agreed that a remedial bargaining order was appropriate, pursuant to

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[1] The ALJ explained that petitioner's unfair labor practices, including the layoff for discriminatory reasons of three known Union supporters, "not only depleted the ranks from which the Union surely would be expected to draw support, but signaled to all employees in the appropriate unit the lengths to which [petitioner] would go to thwart organization" (Pet. App. A92). Moreover, the ALJ noted, petitioner's solicitation of employee comments, criticisms, and suggestions with respect to supervision, wages, benefits and working conditions "conveyed to every member of the collective bargaining unit the implied message that management policy would be reshaped to conform to their criticisms upon the Union's demise, and amounted to an unfair labor practice which would continue to stir the imagination of employees even after application of conventional Board remedies" (*id.* at A92-A93).

this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). In particular, the Board explained, petitioner's unfair labor practices satisfied that portion of *Gissel* that authorizes the issuance of a bargaining order where there are " 'less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' " (Pet. App. A21 (quoting *Gissel*, 395 U.S. at 614)). The Board noted (Pet. App. A22):

> Threats of plant closure, termination, and other retaliation against union activities are clearly calculated to have a coercive effect that will linger. The termination of three employees certainly would have serious and prolonged consequences. Furthermore, the unit was small, with only 22 employees; the violations were widely disseminated; and the serious violations directly affected almost one-third of the union employees.

The Board accordingly found that "the possibility of erasing the effects of [petitioner's] unfair labor practices using the traditional Board remedies is slight" and that "an election would not reflect uncoerced employee sentiment" (*ibid.*). It concluded that, "in light of the seriousness of the violations and their impact on the entire unit," a bargaining order should issue—notwithstanding the "significant passage of time since the violations occurred" (*ibid.*).

4. On August 28, 1987, following the Board's decision and order, petitioner filed a motion for reconsideration and reopening of the record. In it, petitioner contended that a bargaining order was unwarranted "because the passage of time, employee turnover, and the computerization of unit work have dramatically reduced and altered the composition of the unit and have erased the coercive effects of the unfair labor practices on the present unit em-

ployees" (Pet. App. A11). On September 30, 1987, the Board denied petitioner's motion (*id.* at A10-A11).

5. The court of appeals enforced the Board's order (Pet. App. A6-A9). The court found that "[t]he record * * * fully supports the Board's conclusion that A[h]ner, Eckhart and Phillips were discharged because of their support of the union" (*id.* at A8). It also rejected petitioner's contention that, because conditions had changed since the time of the election, enforcement of the bargaining order should be denied. The court explained that "[w]hile passage of time and turnover may be relevant to the Board's choice of remedy, the Board may nevertheless conclude that past union activity, employer response to such activity, and continuing presence in the bargaining unit of employees subjected to that response, and the continuing presence of the same employer management make a bargaining order appropriate" (*id.* at A8-A9). The court held that "[g]iven the small size of the bargaining unit, the intensity of the employer's anti-union surveillance and interrogation, the severity of penalties inflicted on those union supporters who were discharged, the closure threats, the solicitation of grievances, the presence in the unit of employees who were there at the time, and presence of the same managers, the Board reasonably concluded that the ordinary cease and desist, reinstatement and make whole remedies would not erase the effects of the employer's unfair labor practices in eroding the union's former majority status" (*id.* at A9).

## ARGUMENT

The decision of the court of appeals involves the application of settled principles to the facts of this case, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may issue bargaining orders in two kinds of cases: "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (*id.* at 613-614). In the first class of cases, a bargaining order may issue even though the union never had majority support; in the second class, a bargaining order may issue "where there is * * * a showing that at one point the union had a majority" and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * * " (*id.* at 614-615).

Applying these settled principles, the Board found that the Union had a clear card majority on April 6, 1981, and that its majority status was undermined by petitioner's "extensive and pervasive unfair labor practices" (Pet. App. A20-A21). In particular, the Board found, and the court of appeals agreed (see *id.* at A9), that petitioner's "highly coercive unfair labor practices" were "clearly calculated to have a coercive effect that will linger" (*id.* at A22). It concluded that "the possibility of erasing the effects of [petitioner's] unfair labor practices using the traditional Board remedies is slight" and accordingly that "an election would not reflect uncoerced employee sentiment" (*ibid.*).

Petitioner contends at length (Pet. 8-18) that the court of appeals' decision is in conflict with numerous decisions of other courts of appeals, which have recognized that "subsequent events, such as the passage of time and bargaining unit turnover * * *, lessen the deleterious

effects of an employer's unfair labor practices thereby making a fair election possible" (Pet. 8). The court of appeals acknowledged the same principle, expressly recognizing that the "passage of time and turnover may be relevant to the Board's choice of remedy" (Pet. App. A8). On this record, however, the court of appeals found that the severity of petitioner's violations—coupled with the continued presence in this small bargaining unit of employees who had witnessed the unfair labor practices, as well as the continued presence of the same managers[2]—rendered alternative remedies unlikely to "erase the effects of [petitioner's] unfair labor practices in eroding the union's former majority status" (*id.* at A9). It therefore enforced the bargaining order issued by the Board. In short, the difference between this case and those cited by petitioner is not one of the governing legal standard, but only a difference in the facts of the particular cases. The court of appeals' fact-bound resolution of this case warrants no further review.

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[2] Petitioner concedes (Pet. 5) that employees who had witnessed the unfair labor practices remain in the unit, and petitioner's motion papers before the Board did not allege that *any* of the managerial employees who had engaged in those unfair practices had departed (see C.A. App. 439a-465a).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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